No._____

IN THE

SUPREME COURT OF THE UNITED STATES

LATRAY WHITLEY,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

George W. Aristotelidis
Requesting Appointment
In Forma Pauperis
Tower Life Building
310 South St. Mary's St.
Suite 1910
San Antonio, Texas 78205
(210) 277-1906 - Telephone
(844) 604-0131 – Telefax
jgaristo67@gmail.com

QUESTION PRESENTED FOR REVIEW

Whether the state district court's determination that 1. written, 5K1 and Rule 35-based cooperation addenda between two federal inmates who testified against Petitioner at his murder trial and the federal government, 2. audio recorded communications between lawyers for the two federal inmates and a San Antonio Police Department detective in which the detective agreed to keep an open mind about making favorable recommendations for leniency at the federal inmates's upcoming federal sentencings, and 3. audio recorded debriefings about the murder between the federal inmates, their respective counsel, federal prosecutors handling the inmates's upcoming sentencings, and the state prosecutors in Petitioner's murder investigation, respectively, should have been disclosed by the state prosecutor to the Petitioner's defense counsel before Petitioner's trial for murder, as impeaching evidence under *Giglio* v. *United States,* 405 U.S. 150 (1972), and whether the district court correctly determined, alternatively, that the failure to disclose the evidence was not material to Petitioner's case, where the only testimony material to the Petitioner's guilt was presented at the Petitioner's trial by the two federal inmates?

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PRAYER

The petitioner, LATRAY WHITLEY, (Petitioner) respectfully prays that a writ of certiorari be granted to review the order denying habeas relief of by the 186th District Court of Bexar County, Texas, reverse the Petitioner's conviction for murder, and his case for a new trial.

OPINIONS BELOW

On June 5, 2019, the Texas Court of Criminal Appeals refused Mr. Whitley's application for Tex. Crim. Pro. Art. 11.07 writ of habeas corpus.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Petitioner's questions implicate the Due Process Clause's right:

…nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV

STATEMENT OF THE CASE

A. Procedural History of the Case:

Petitioner, Latray Whitley was indicted for murder CR. 6-7. [1] On May 10, 2013, Whitley was convicted of murder (5 RR 50), and sentenced to a life term in the Texas Department of Criminal Justice. (5 RR 117) On July 23, 2014, the San Antonio Fourth Court of Appeals affirmed Whitley's murder conviction.[2] Whitley did not pursue discretionary review from this opinion, of the Texas Court of Criminal Appeals (TCCA), the highest court of criminal appeals in Texas. [3]

On May 24, 2018, Petitioner filed his corrected, second amended application for an 11.07 writ of habeas corpus, with the 186th D. Ct. of Bexar County, Texas. After a series of evidentiary hearings, the district court filed findings of fact and conclusions of law, with a recommendation that the TCCA deny relief. On June 5, 2019, the TCCA denied Petitioner relief on his 11.07 application. Mr. Whitley's certiorari petition is due to be filed no later than Tuesday, September 3, 2019.

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[1] The Clerk's Record on appeal, titled CR [page number] and the Reporters Record, is referred to as RR [page number].

[2] Unpublished Opinion by the Fourth Court of Appeals; *State v. Whitley*, No. 04-13-00314-CR (July 23, 2014)(unpublished).
http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=0e855596-af1c-4577-866f-3f562edcc2ba&coa=coa04&DT=Opinion&MediaID=b93c1e0e-8f65-4b5f-bac7-

B. Facts:

Corey Cumby was shot and killed on November 8, 2009, in San Antonio, Texas. After preliminary investigations, the case went cold. Almost three years later, Reginald Green and Alvin Clark met at the Wilson County Jail, Floresville, Texas, while detained on respective federal charges, and discussed Cumby's murder. Clark claimed to have seen Petitioner shoot and kill Cumby from a moving vehicle; Green claimed that Petitioner admitted to him to have killed Cumby, while he and the Petitioner were custodied at the Wilson County detention center.

Green and Clark each contacted their lawyers, Clark Adams (former/retired AFPD) and Scott McCrum, of San Antonio, and told them that they wanted to cooperate with the San Antonio Police Department (SAPD) about the murders, in exchange for recommended leniency in their upcoming federal revocation/sentencings. Adams and McCrum separately contacted SAPD Detective Tom McNelly, to offer cooperation, communications that were secretly recorded by McNelly. During the conversations, Adams and McCrum each offered their client's cooperation, in exchange for recommended leniency, to which McNelly responded that he would hear what each had to say, and that for any assistance, the information given would have to be "paramount" to the state's case. Neither of these recorded conversations were disclosed to Petitioner's trial lawyer, Jesus Aguilera, at any point

before his murder trial. Green and Clark each debriefed with state prosecutors, in the presence of their respective attorneys, and federal prosecutor David Shearer (since retired). These debriefings were recorded as well, but also not provided to Petitioner's trial counsel at any point before the murder trial.

Thereafter, lead state prosecutor Tanner Neidhardt emailed Shearer requesting copies of all cooperation agreements entered into by Green and Clark with the government - the addenda attached to their respective plea agreements - as well as a 5K1 motion for downward departure for Clark, which was filed by Shearer (in which Shearer specifically remained open to consider additional reductions in exchange for Clark's additional cooperation in the murder investigation), in part on the basis of Clark's cooperation about his claim to have seen Petitioner murder Cumby, and granted by a federal district Judge Orlando Garcia. Neidhardt *via* email thanked Shearer for the documents, explaining that he would be forwarding them to Petitioner's defense counsel, as per the state district court's discovery orders. But Neidhardt had a change of heart.

In lieu of turning over the written agreements to Aguilera, Neidhardt filed a response with the Court, in which he explained that none of the federal cooperation addenda that he represented as "filed under seal" in federal court, including Clark's 5K1 motion, were discoverable as *Brady / Giglio* evidence. Neither did Neidhardt

turn over the documentation to the district court for its *in camera* review, as alternatively motioned by Aguilera, and ordered by the state district court in its discovery orders. Like the secret and debriefing recordings, the federal documentation was not disclosed to Aguilera at any point before Petitioner's murder trial. From the time that the federal documentation was emailed by Shearer by Neidhardt, there were global emails between Neidhardt, Shearer, McCrum and Adams, on the subject of the cooperation, and McCrum and Adams's expectations, at the conclusion of Petitioner's murder trial, for the state prosecutor to make a favorable recommendation to the federal prosecutor, to convince the federal prosecutor to file a 5K1, substantial cooperation motion for a sentence reduction in federal court, in the Green and Clark's subsequent federal sentences.

At Petitioner's murder trial, Mr. Aguilera, wholly unfamiliar with federal criminal practice, inquired of learned counsel, and questioned both Green and Clark about whether either had a "Rule 35 agreement," and both denied it. Neither Neidhardt or his co-prosecutor corrected the record at trial and even argued against Aguilera inquiring about the subject, on the basis that no such agreements existed. In closing arguments, Neidhardt rebuffed Aguilera's efforts at attempting to show the jury that Green and Clark testified in exchange for an expectation of a benefit in their federal cases, by arguing that the testimony was given for altruistic reasons.

Petitioner was convicted of murder and he received a life sentence. Thereafter, Green received a favorable recommendation by Neidhardt, *via* letter addressed to Adams, in which he lauded Green's efforts in helping the state convict Petitioner Green, which prompted Shearer to recommend a time served, supervised release sentence, which was later reduced by Judge Garcia (after a second effort by Adams, *via* Shearer) to a termination of his supervised release term altogether. Clark, who had already received a upon Shearer's recommendation on the basis of his cooperation in the murder investigation, even before he testified at trial, was not recommended for a *post*-trial recommendation. Unlike the case with Green, Neidhardt's letter to McCrum described Clark as difficult and unwilling to cooperate. This negative report card prevented Shearer from recommending a 5K1 reduction.

Petitioner appealed his conviction, but was affirmed by the San Antonio Fourth Court of Appeals. Petitioner filed an 11.07 application for a post-conviction writ of habeas corpus. After a series of hearings before the 186th District Court of Bexar County, the district court recommended against relief, and the TCCA denied relief.

In its findings, the state district court waivered on the subject whether the state prosecutor was required to disclose the federal addenda but ultimately determined that the state prosecutor was required to disclose them, and failed to do so. The Court, however, did not agree that the recordings between Clark's and Green's

lawyers, and Det. McNelly were discoverable under *Giglio*. Ultimately, the district court determined that, in any event, the failure to disclose the materials/recordings were not material under *Giglio*. In support of its recommendation against granting relief, the district court issued the following findings:

1. The prosecution must give the defendant any evidence it possesses that is favorable to the defendant and material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83 (1963). This includes evidence which might be useful for impeachment by the defendant. *United States v. Bagley*, 47 U.S. 67 (1985).

2. Although a prosecutor has the initial responsibility to assess whether evidence may be favorable to the defense, the prosecutor is *not* the "final arbiter of what constitutes evidence." *Ex parte Temple*, No. WR-78,545-02, 2016 WL 6903758 *3 (Tex. Crim. App. November 23, 2016).

3. To establish entitlement to a new trial based on a Brady violation, a defendant must demonstrate that (1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith; (2) the withheld evidence is favorable to him; and (3) the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. *Hampton v. State*, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002).

4. Applicant urges this court to follow *United States v. Dvorin*, 817 F.3d 438 (5th Cir. 2016) in recommending that Applicant's conviction be vacated. In *Dvorin*, the District Court held that the prosecution had violated *Brady* and *Giglio* by failing to turn over a codefendant's plea agreement supplement similar to the ones in Clark's and Green's federal cases. The government agreed to an order vacating Dvorin's conviction, holding that the codefendant had testified falsely. The Fifth Circuit analyzed the issue as follows:

> Jason Dvorin was a business customer of Pavillion Bank ("Pavillion") with multiple accounts and loans collateralized by vehicles and oil-field equipment. To alleviate his periodic cash-flow issues, Dvorin brought checks to Pavillion's executive vice president, Chris Derrington, that neither man expected would clear. Derrington nonetheless processed the checks, giving Dvorin access to the face value of the check until the checks were returned. This arrangement operated as an unofficial line of credit. Dvorin and Derrington maintained this arrangement from 2005 through December of 2010, during which time the bank charged Dvorin more than $19,000 in overdraft fees.
>
> The arrangement continued for five years, in part because Dvorin was able

> to periodically deposit large, legitimate payments into his accounts. Ultimately, however, bank auditors discovered the scheme. In 2012, the government indicted defendant Dvorin on one count of conspiring to commit bank fraud. The superseding indictment alleged that between 2005 and December 2010, Dvorin and Derrington engaged in a scheme in which they deposited checks in Dvorin's account knowing the deposited checks would not clear. . . .
>
> After a two-day trial, a jury found Dvorin guilty. During trial, the government elicited testimony from Derrington, who had pleaded guilty to conspiring to commit bank fraud and was awaiting sentencing. Derrington explained that he had cooperated with the government during its investigation, and that he was testifying in the hope that he would obtain some leniency in his sentencing. The prosecutor asked Derrington whether he had received any promises from the government in exchange for his testimony, and Derrington responded that he had not. The court sentencedDvorin to 24 months of imprisonment and ordered $111,639.73 in restitution.

Dvorin appealed, and we set the case for oral argument. While preparing for oral argument, the government's appellate counsel discovered that the trial prosecutor, Mindy Sauter, had failed to disclose Derrington's sealed plea agreement supplement to Dvorin's counsel. The plea agreement supplement stated, in relevant part, that, "[i]f in its sole discretion, the government determines that the defendant has provided substantial assistance in the investigation or prosecution of others, it will file a motion urging sentencing consideration for that assistance." *The government produced the supplement to Dvorin's counsel and agreed to an order vacating Dvorin's conviction and remanding the case for a new trial.*

On remand, the district court sua sponte issued a show cause order in which it requested that the government's counsel file a pleading addressing why sanctions should not be imposed for Sauter's failure to disclose Derrington's plea agreement supplement and Sauter's permitting Derrington to falsely testify that the government had not made him any promises. The district court held an evidentiary hearing in connection with the show cause order, and thereafter made preliminary findings that Sauter had violated *Brady* and *Giglio* by failing to turn over Derrington's plea agreement supplement. The district court also concluded that Sauter had violated *Napue* by permitting Derrington to testify falsely regarding the promises the government made him. The district court found that Sauter did not act in "bad faith," but "exhibited a reckless disregard for her duties and conducted the proceedings in an irresponsible manner." . . .

. . . Dvorin was tried a second time and the jury once again convicted Dvorin of conspiring to commit bank fraud. The district court then imposed a new sentence of 18 months of imprisonment, two years of supervised release, and $110,939.73 in restitution. . . . The district court declined to impose sanctions based on Sauter's

prosecutorial misconduct, but formally adopted as final its substantive findings that Sauter committed *Brady, Giglio*, and *Napue* violations. . . .

* * *

1. Brady and *Giglio*

Sauter contends that the district court erred in concluding that she violated *Brady* and *Giglio* by failing to provide Dvorin's counsel a copy of Derrington's plea agreement supplement before Dvorin's first trial. *Brady* prohibits the prosecution from suppressing evidence favorable to the defendant "where the evidence is material either to guilt or to punishment," *Brady,* 373 U.S. at 87, 83 S.Ct. 1194, and *Giglio* applies *Brady* to evidence affecting the credibility of key government witnesses. *United States v. Davis,* 609 F.3d 663, 696 (5th Cir.2010). To establish a *Brady* violation, a defendant must show: (1) the evidence at issue was favorable to the accused, either because it was exculpatory or impeaching;
(2) the evidence was suppressed by the prosecution; and (3) the evidence was material. *Brown,* 650 F.3d at 587–88. Sauter concedes that the plea agreement supplement was favorable to Dvorin because it related to the credibility of a government witness, but she contends that the district court erred in concluding that the supplement was suppressed and material.

a. Suppressed

Sauter argues that the plea agreement supplement was not suppressed because its existence was disclosed to Dvorin's counsel by a reference to it in Derrington's plea agreement, which was disclosed to Dvorin. Sauter contends that this should have prompted Dvorin's counsel to request the plea agreement supplement from the prosecution. Dvorin counters that the supplement was suppressed because, although the plea agreement referenced the supplement, the supplement itself was sealed, and thus could not be discovered by Dvorin's counsel through due diligence.

To constitute suppressed evidence under *Brady,* the evidence must not have been discoverable through the defendant's due diligence. *Brown,* 650 F.3d at 588. "[E]vidence is not suppressed if the defendant knows or should know of the essential facts that would enable him to take advantage of it." *Id.* (quoting *United States v. Skilling,* 554 F.3d 529, 575 (5th Cir.2009)). The *Brady* analysis regarding suppression focuses on the fact that the government need not "furnish a defendant with exculpatory evidence that is fully available to the defendant through the exercise of reasonable diligence." *Kutzner v. Cockrell,* 303 F.3d 333, 336 (5th Cir.2002). Sauter does not, nor can she, contend that the plea agreement supplement was fully available to Dvorin's counsel through the exercise of due diligence. *The plea agreement supplement was sealed and in the control and possession of the government. Accordingly, the district court correctly determined that Sauter suppressed the plea agreement supplement.*

b. Material

Sauter next argues that the plea agreement supplement was not material for *Brady* purposes, because there is no reasonable probability that, had the evidence been disclosed, the result of Dvorin's first trial would have been different. Dvorin responds that the testimony elicited at trial based on Derrington's plea agreement *did not convey* that the government had promised Derrington to forego other charges, had agreed that his testimony and statements could not be used against him, *and had agreed to file a motion for sentence reduction in the event it found Derrington's assistance substantial. Further, Dvorin contends that the testimony elicited at trial did not convey that all of these promises were expressly contingent on Derrington's testimony.*

"Evidence is material if there is 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Brown,* 650 F.3d at 588 (quoting *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Spence v. Johnson,* 80 F.3d 989, 994 (5th Cir.1996) (quoting *Bagley,* 473 U.S. at 682, 105 S.Ct. 3375). The district court held that the plea agreement supplement was material because although the jurors might have been aware during trial that Derrington cooperated with the government in his own case, *they were not aware that Derrington had motivation to testify in Dvorin's trial. The court concluded: "[b]ecause the undisclosed evidence undermined the credibility of the Government's most important witness, ... it was material."*

We find no abuse of discretion in the district court's conclusion that this evidence was material. *Derrington was a key witness and the only other alleged conspirator with Dvorin. During trial, Derrington testified that he was "cooperating with the ... Government" and "hope[d] to obtain some leniency" at sentencing, but represented that he did not "get any promises from the Government in exchange for [his] testimony." During cross examination, Dvorin's counsel elicited testimony that Derrington was hoping to get favorable treatment from the court and the government based on his cooperation. But this testimony does not make clear, nor does the plea agreement itself indicate, that the government agreed to "file a motion urging sentencing consideration for Derrington's cooperation if, in its sole discretion, it determine[d] that he ha[d] provided substantial assistance in the investigation or prosecution of others." It is reasonable to conclude that evidence of such consideration would be more powerful than Derrington's testimony that he merely hoped he would receive leniency, but had not received any promise from the government that he would. "[G]iv[ing] play to the trial court's superior understanding of the trial, evidence, and witnesses," United States v. Sipe,* 388 F.3d 471, 480 (5th Cir.2004), we affirm the district court's holding that the withheld evidence was material, and thus conclude that Sauter violated *Brady* and *Giglio.*

2. Napue

Sauter also challenges the district court's holding that she violated *Napue's* prohibition against a prosecutor knowingly using false testimony to obtain a conviction. To establish a claim under *Napue,* a defendant must prove that the witness's testimony "was (1) false, (2) known to be so by the state, and (3) material." *Summers v. Dretke,* 431 F.3d 861, 872 (5th Cir.2005). Sauter contends that Derrington's testimony was not false (and thus she could not have knowledge that it was false), and even if it was, it was not material.

With respect to the first element, Sauter argues that Derrington's testimony that he did not receive any promises from the government in exchange for his testimony was not false because the text of the plea agreement supplement is not an enforceable promise or guarantee. Paragraph 2 of the supplement reads:

> If, in its sole discretion, the government determines that the defendant has provided substantial assistance in the investigation or prosecution of others, it will file a motion urging sentencing consideration for that assistance. Whether and to what extent the motion are granted are matters solely within the Court's discretion.

Regardless of whether this provision of the supplement is an enforceable guarantee, under *Napue, "the key question is not whether the prosecutor and the witness entered into an effective agreement, but whether the witness might have believed that the state was in a position to implement any promise of consideration." LaCaze v. Warden La. Corr. Inst. for Women,* 645 F.3d 728, 735 (5th Cir.2011) (alterations omitted) (quoting *Napue,* 360 U.S. at 270, 79 S.Ct. 1173); *see also Giglio,* 405 U.S. at 155, 92 S.Ct. 763 ("[E]vidence of any understanding or agreement as to a future prosecution would be relevant to [the witness's] credibility...."). In fact, as the Supreme Court recognized in *United States v. Bagley,* the fact that *the government's willingness to seek leniency for a defendant is not guaranteed, but "was expressly contingent on the [g]overnment's satisfaction with the end result, serve[s] only to strengthen any incentive to testify falsely in order to secure a conviction."* 473 U.S. at 683, 105 S.Ct. 3375. The focus is "on the extent to which the testimony misled the jury[.]" *Tassin v. Cain,* 517 F.3d 770, 778 (5th Cir.2008). Here, Derrington's testimony that he had not received any promise from the government was at best misleading, and at worst false, *in light of the government's agreement to file a motion urging sentencing consideration if it determined that Derrington had substantially assisted its prosecution of Dvorin.* Accordingly, we hold that the district court properly concluded that Sauter violated *Napue* in permitting Derrington to testify that that the government had not made any promises in exchange for his testimony.

With respect to the third element—materiality—Sauter again challenges the district court's conclusion that Derrington's false testimony was material, and in doing so, concedes that the materiality standard in Napue is essentially identical

to the analysis performed under *Brady*. Thus, for the reasons discussed above, we conclude that Derrington's false statement that he had not received any promise from the government was material and, accordingly, affirm the district court's finding that Sauter violated *Napue.*

United States v. Dvorin, 817 F.3d 438 (5th Cir. 2016) (Emphasis added).

5. The trial court believes that Tanner Neidhardt *should* have provided the federal plea agreements and sealed plea agreement supplements to defense counsel. Merely disclosing their existence was not sufficient under *Brady*.

6. However, besides the fact that Fifth Circuit case law is not binding precedent in state habeas decisions (*See Cooper v. State*, 631 S.W.2d 508, 514 (Tex. Crim. App. 1982), there are key distinctions between the facts of this case and the facts in *Dvorin*, such that the holding in *Dvorin* is not controlling here.

a) In *Dvorin*, the prosecuting entity that had entered into the plea agreement with Derrington (the United States) was the same prosecuting entity who was prosecuting Dvorin. Derrington entered into his federal plea agreement with the understanding that, if he testified against Dvorin, he would receive a benefit in his case.

However, in the present case, the State was in no way a party to the plea agreement entered into between the United States and Clark and Green, and at the time Clark and Green pled in their federal cases, this case was not in consideration.

b) In *Dvorin*, Derrington was a co-defendant in the same fraudulent scheme who had pled guilty and was awaiting sentencing.

In this case, Clark and Green were not involved as defendants or accomplices. They were witnesses. They had already been sentenced in their federal cases, and the federal cases were unrelated to Applicant's State's case. The fact that they had already received a reduction in their federal cases for providing information to detectives in this case did not evidence any understanding or agreement of a future benefit for testifying.

c) In *Dvorin*, Derrington admitted that he was currently cooperating with the United States Government, and he admitted that he was hoping for leniency on his sentence in that same case as a reward for testifying. Thus, the plea agreement supplements that were withheld from Dvorin related directly to Derrington's admitted motive for testifying favorably for the Government against Dvorin.

However, in this case, both Clark and Green denied cooperating with the State in order to benefit their federal cases. They denied having any type of agreement or arrangement, and they denied having any hope of gaining a benefit from testifying. Both appeared to be reluctant witnesses.

d) In *Dvorin*, the Government prosecuting Dvorin *had agreed* to "file a motion urging sentencing consideration for Derrington's cooperation if, in its sole discretion, it determine[d] that he ha[d] provided substantial assistance in the investigation or prosecution of others."

In this case, however, the Federal Government did not promise anything related directly to this case, and, more importantly, Neidhardt (the State) did not agree to do anything toward urging sentencing consideration in exchange for *or even as a result of* Green's or Clark's cooperation in this case. The State had no "discretion" to urge a reduction of Green's or Clark's federal sentences. All Neidhardt agreed to was, *if asked*, he would tell the federal prosecutors his impression of Green's and Clark's testimony in this trial. He made it clear, and this court finds him to be truthful and credible in this regard, that he made no advance promises to help Green and/or Clark in any way with regard to their federal cases. In fact, had it not been for Green's and Clark's federal attorneys, it is doubtful that Neidhardt would have ever contacted the federal prosecutor with regard to Green's and/or Clark's testimony in this trial.

7. Applicant urges that, even if there were no formal agreement, there was at least an *understanding* between the State and Green and Clark that if they testified favorably they would receive a benefit in their federal cases. **However, there is simply no evidence of such understanding.** In fact, both Clark and Green denied that there was any type of agreement or expectation on their parts to receive any *additional* benefit from testifying.

8. Clark and Green had already obtained a benefit on their federal sentences over a year before this trial for providing information to the State regarding this case. There is no evidence suggesting that they would have further benefitted, or expected to further benefit, from testifying against Applicant *at trial*.

9. Nevertheless, the trial court believes that the State, in an abundance of caution, should have provided the federal plea agreements and supplements to defense counsel. It is disingenuous to maintain that they could not be considered as favorable to the defense. While they do not constitute actual agreements between the State and the witnesses to testify in this trial, they do represent what could be interpreted as evidence of a possible motive to testify favorably for the State. Defense counsel, if he'd been permitted, could

have inquired further about the possibility that they could have sought further reduction of their federal sentences in exchange for their testimony. Even though both witnesses denied such incentive to testify for the State, having the actual plea agreements to impeach the witnesses might have been helpful to the defense.

10. But there is still no indication of how such line of questioning would have gone or how it would have affected the jury's decision, if at all. And that leads to the third requirement to establish entitlement to a new trial based on a Brady violation—a defendant must demonstrate that the evidence is *material.* Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Ex parte Adams*, 768 S.W.2d 281, 291 (Tex. Crim. App. 1989). The materiality of withheld evidence must be considered cumulatively and not item by item. *Turner v. United States*, 137 S.Ct. 1885 (2017).

11. This court finds that Applicant has not met the materiality requirement under *Brady*. In this case, there was too much of a disconnect between the state trial against Whitley and Green's and Clark's federal drug cases for which they had already been sentenced. It is true that the defense could have asked additional questions in an attempt to impeach their credibility. However, once their federal cases were revealed to the jury, and once they both denied having any agreements to testify in this case to better their federal cases, it is unlikely that any additional impeachment efforts would have *significantly* affected the persuasiveness of their testimony, particularly in light of the other facts presented by the State.

12. Thus, under these facts, even if defense counsel had been furnished Clark's and Green's federal plea agreements and sealed supplements, this court finds that there is not a reasonable probability that the outcome of the trial would have been different. Unlike in *Ex parte Temple*, No. WR-73,545-02, 2016 WL 6903758 *3 (Tex. Crim. App. November 23, 2016), in this case, the prosecutor's misconception regarding his duty under *Brady* was not "of enormous significance."

13. Applicant also alleges that the State failed to turn over the recorded conversations between federal lawyers for Clark and Green and SAPD regarding a possible deal in exchange for information about Cumby's murder.

a) Alvin Clark's federal attorney, Scott McCrum, and Reginald Green's federal attorney, Clark Adams, contacted SAPD detectives by telephone in 2011 (two of the four recordings submitted as exhibits), stating that their clients had information about an unsolved murder, and they wanted to share this information with SAPD, in exchange for favorable treatment for their clients on their federal charges.

b) On August 29, 2011, Detective McNelly met with Alvin Clark and Scott McCrum (recorded interview submitted as an exhibit). In this recording, Alvin Clark's recitation of the facts are very similar to his testimony in Applicant's

trial.

c) On December 16, 2011, an SAPD detective met with Reginald Green and his federal attorney Clark Adams in a federal detention facility in Florence, Colorado. This interview is the fourth recording submitted as an exhibit. In this recording, Reginald Green's recitation of how he learned of Latray Whitley's involvement in the murder was very similar to his testimony at trial.

d) These phone calls and interviews took place almost a year before Applicant was indicted for the Cumby murder.

e) As a result of Clark's cooperation in providing SAPD with information pertaining to Applicant's involvement in the Cumby murder, Clark's federal sentence was reduced. This occurred before Clark testified in Applicant's trial.

14. Applicant must show that the undisclosed recordings are favorable to his case. Applicant has not demonstrated that the disclosure of the recordings would have made the difference between a conviction and acquittal. Thus the recordings are not "favorable" as contemplated in *Bagley*. The recordings show that the witnesses were looking for a deal *at that time*, and as it turns out, they did receive benefit on their federal sentences for providing the information that was recorded. But that all took place almost two years before this trial, and the recordings do not establish that there was an agreement in exchange for testimony *in this trial*.

15. The recordings are of limited value because they do not refute the fact that there were no agreements in exchange for the witnesses's testimony. *See. Ex Parte Miles*, 359 S.W.3d 647, 666 (Tex. Crim. App. 2012) (citing *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Agurs*, 427 U.S. at 109–10, 96 S.Ct. 2392; *Hampton*, 86 S.W.3d at 613; *Smith*, 132 S.Ct. at 630–31).

16. With regard to the recordings, this court finds that Applicant has not provided sufficient facts to support a claim of prosecutorial misconduct, nor has Applicant met the materiality requirement.

17. Absent additional facts of an agreement or deal between the witnesses Clark and/or Green and the state regarding testifying favorably in order to benefit their federal cases, this court finds that there was no established connection between the federal cases and the witnesses's possible motive to "curry favor" with state authorities by testifying favorably in this case. *See Irby v. State*, 327 S.W.3d 138, 149 (Tex. Crim. App. 2010).

18.

Petitioner's certiorari petition is due to be filed no later than September 3, 2019.

REASON FOR GRANTING THE WRIT [RESTATED]

> The State Withheld Exculpatory Evidence, Specifically, Impeachment Evidence in the form Of Clark's and Green's Federal Cooperation Agreements and Clark's Motion For 5K1 Downward Departure, and the Recorded Agreements between Clark and Green's Lawyers, and Detective McNelly of the SAPD, all of which Were Material to Whitley's Defense, In Violation of the Due Process Clause, as Provided by *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Bagley*, 473 U.S. 667 (1985), and *Kyles v. Whitley*, 514 U.S. 419 (1995), and Its Progeny.

A. Legal Arguments

Whitley submits that the State committed material *Giglio* violations, by failing to disclose Clark's and Green's federal cooperation agreements, and Clark's 5K1, downward departure motion, as well as the recorded agreements between Clark's and Green's lawyers, and Detective McNelly. Because the disclosure violations were material, Petitioner's conviction should be reversed.

A. Cooperation Memoranda

1. The State Failed to Disclose Impeaching Evidence that was Material to Whitley's Trial:

In *Brady v. Maryland*, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Strickler v. Greene*,

527 U.S. 263, 280 (1999) (citing *Brady v. Maryland*, 373 U.S. 83 at 87 (1963)). The Court has since held that "the duty to disclose such evidence is applicable even though there has been no request by the accused (*United States v. Agurs*, 427 U.S. 97, 107 (1976)), and that the duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985))." *Id*. Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id*. (citing *Brady* at 682; *see also Kyles v. Whitley*, 514 U.S. 419, 433-434 (1995)).

"There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler* at 281-82. In order to obtain relief, a petitioner must demonstrate that "'there is a reasonable probability' that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." *Strickler* at 289. In *Kyles*, the Supreme Court elaborated on the meaning of materiality as it relates to the final result of the trial:

Bagley's touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant

would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown **when the Government's evidentiary suppression "undermines confidence in the outcome of the trial."** *Id.* at 1566 (*quoting Bagley*, 473 U.S. at 678) (Whitley's emphasis).

Whitley's case did not implicate, in a literal sense, exculpatory evidence, as occurred in *Brady*. *See Bagley*, at 676. In Whitley's case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. *Id*. Notwithstanding, the Supreme Court has made it clear that "[i]mpeachment evidence…as well as exculpatory evidence, falls within the *Brady* rule." *Id*. (citing *Giglio* at 154). "Such evidence is 'evidence favorable to an accused,' (*Id*. (citing *Brady* at 87) so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." *Id*.; *Cf. Napue* at 269) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

The State's *Giglio* violation is practically identical to the ones in *Bagley*, where the Supreme Court agreed that the prosecutor's failure to respond fully to a *Brady* request may impair the adversary process "[by causing]...the defense [to] abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued." *Bagley*, at 682. The *Giglio* violation is also factually identical to the Sauter's non-disclosure in *Dvorin*. Aguilera testified that had he received Clark's and Greens cooperation agreements, and Clark's 5K1 motion, he would have been able to successfully impeach each about their motives to lie, to counter the state's characterization of each witness at trial and in closing arguments as "stalwarts of the community." Aguilera would have given substance to his otherwise empty strategy of painting Clark and Green as federal convicts in search of a sentence reduction at their upcoming federal sentencings.

Aguilera's ceased efforts to continue to seek *Giglio* evidence only underscored his reliance on Neidhardt's misleading written response, Neidhardt's, Green's and Clark's repeated denials of Rule 35 agreements at trial. Moreover, "the more specifically the defense requests certain evidence," as Aguilera did by way of numerous and dense pretrial requests that were granted by the Court, "thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to

make pretrial and trial decisions on the basis of this assumption." *Id*. at 682-83. "This possibility of impairment," the Court elaborates, "does not necessitate a different standard of materiality…". *Id*. at 683.

In *Bagley*, "the prosecutor disclosed affidavits that stated that O'Connor and Mitchell received no promises of reward in return for providing information in the affidavits implicating respondent in criminal activity." In *Dvorin*, Sauter wholly failed to turn over the government witness' cooperation addendum to the defense. Neidhardt's written response to the Court, *in lieu* of turning over the federal cooperation agreements, and the motion to reduce Clark's sentence, is at least on par with Bagley's and Dvorin's non-disclosures.

2. Aguilera's Due Diligence in Seeking Brady/Giglio Evidence

The state's non-disclosure should not be attributed to a lack of due diligence on Aguilera's part in pursuing the impeaching evidence. Post-Neidhardt's written response, Aguilera could have insisted that the state disclose the documents to him directly, or to the trial court for its own in-camera inspection, relief that was ordered by the Court.

However, as he explained during his habeas testimony, Aguilera did not do more because he relied on Neidhart's response, which he accepted as honest. A review of the evidence, and the testimony presented at Whitley's hearings

demonstrate that Neidhardt's response was drafted with the single purpose of suppressing the federal cooperation documents, and their value to Aguilera as impeachment material against the state's two star witnesses. Aguilera's error was believing Neidhardt. For her part, Judge Herr was also swayed by Neidhardt's denials at trial of anything that smelled *Brady/Giglio*, as evidenced by her decision to forbid Aguilera from revisiting the subject at trial, and her admonishment when Aguilera pushed the issue.

A lawyer in Aguilera's shoes should feel free to rely on a prosecutor's representations, and should not be expected to continue dogged efforts for answers thereafter. To reject this concept, the Courts would have to assume that our prosecuting agencies are so corrupt and unreliable that defense counsel should always be wary of their representations about the existence of *Brady*-type evidence, and should thus continue *ad infinitum* to hound a prosecuting agency, and/or a trial judge for disclosure. Have we reached that point? Whitley's case, as that of Michael Morton and those of a long and apparently unending number of defendants who have been unfairly convicted suggest that we have. But until the United States Supreme Court or the Texas Court of Criminal Appeals accept, as a precedential tenet, that prosecutors cannot be trusted, Aguilera's efforts should not be interpreted as anything less than proper and diligent efforts to obtain the truth.

To his credit, and despite his very limited understanding of federal criminal /cooperation practice, and the ultimate chagrin of the trial judge, Aguilera continued to inquire about the existence of a Rule 35 agreement. Aguilera filed and obtained numerous orders requiring the State to fulfill its *Brady* duty, and doggedly pursued the subject in his examination of Clark and Green, all of which were countered by Neidhardt's unending misrepresentations, lies, and obstructive efforts at all stages of Whitley's trial. No attorney in Aguilera's shoes should be made a scapegoat for the state's misconduct.

Our precedent supports Aguilera's good-faith reliance on Neidhardt's misrepresentations. It is well established that when a prosecutor "'[is] an active participant in shielding any evidence of the facts underlying the [*Brady*] claim,' a prisoner does not have a burden to investigate whether there exists evidence that the government had a constitutional obligation to disclose, but did not." *Jefferson v. United States*, 730 F.3d 537 (6th Cir. 2013) (citing *Starns v. Andrews*, 524 F.3d 612, 619 (5th Cir. 2008) (holding that "there was no requirement that [petitioner] act diligently to investigate further assuming the state could be taken at its word"); *Reeder v. Cain*, No. 13-6493, 2017 U.S. Dist. LEXIS 40261 (E.D. La. Mar. 21, 2017) (Agreeing that habeas petitioner satisfied the due diligence requirement by filing pre-trial motions requesting exculpatory evidence, and that he thus had the

right to assume that the State's disclosure was truthful and reliable) (citing *Starns* at 618)); *Douglas v. Workman*, 560 F.3d 1156, 1181 (10th Cir. 2009) (Holding that petitioner's *Brady* claim based on nondisclosure of an agreement between the prosecutor and the State's key witness was not barred by the statute of limitations because the petitioner, exercising due diligence, could not have discovered the claim any sooner considering the prosecutor's "active participation in shielding any evidence of the facts underlying the [*Brady*] claim."). Whitley reiterates that Aguilera cannot, and should not be the fall guy when granting Whitley relief.

B. Recorded Conversations and Green's and Clark's Recorded Debriefings

Unlike the case with the federal cooperation agreements and Clark's 5K1 motion, which Neidhardt misrepresented in his response to the Court's disclosure orders, and which he and his co-prosecutor misrepresented and exploited at trial, the state failed to disclose McNelly's surreptitiously recorded, negotiated agreements with Clark's and Green's lawyers and the recordings containing the actual debriefings, in which Clark and Green specifically expressed their interest in receiving favorable recommendations in their upcoming federal hearings. These conversations/debriefings represent information independent of the federal agreements that should also have been disclosed as *Giglio* evidence to Aguilera.

During his habeas testimony, Neidhardt admitted that during his handling of the case, he reviewed, albeit not recently, McNelly's recorded negotiation with McCrum and Adams. To the extent that any information escaped him, *Brady* also encompasses evidence "known only to police investigators and not to the prosecutor." *Brady* at 280-81; *Kyles* at 438. In order to comply with *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles*, at 437. Thus, "…the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Id*. at 437-38.

Bagley and *Dvorin* amply support the position that McNelly's secretly negotiated agreement with Green's and Clark's lawyers promised a reward subject to the state's determination that the cooperation was, in McNelly's words, "genuine," and "paramount to the case." But any notion that this agreement may not have "technically constitute[d] a "'promise of reward,' the natural effect" of Neidhardt's failure to disclose McNelly's secret negotiations, and his failure to acknowledge McNelly's role in the cooperation process in his response to the Court - which painted McNelly as a figure without any relevant connection to any cooperation, "would be misleadingly to induce [Aguilera] to believe that [Clark

and Green]" testified "without any 'inducements.'" *Id*. Restated, when "the 'reliability of a given witness may well be determinative of guilt or innocence (*Giglio* at 154 (quoting *Napue* at 269)), and when 'the Government's case [depends] almost entirely on' the testimony of a certain witness (*Giglio* at 154),'" as was the case with both Clark and Green, "evidence of that witness' possible bias simply may not be said to be irrelevant, or its omission harmless." *Id*. at 690-691.

This Honorable Court should therefore recommend that the Texas Court of Criminal Appeals reverse Whitley's conviction and remand for a new trial, on this alternative ground.

C. Conclusion

How far have we come since *Bagley's* publication more than 30 years ago can be gauged by the Supreme Court's treatment of two recent cases involving *Brady* violations.

The first, *Smith v. Cain*, 132 S. Ct. 627 (2012), involved the United States Supreme Court's review of a petition that complained of a failure by Louisiana State prosecutors to disclose numerous *Brady* admissions during police interviews by the State's lone eyewitness, who identified Smith as a shooter at trial, that when interviewed privately, Smith "could not ID anyone because [he] couldn't see faces" and "would not know them if [he] saw them." *Smith*, at 630. During oral

arguments before the Court on November, 2011 by the attorney for the state, described as a "Disaster at the Lectern" [4] after her unrelenting efforts to justify the state's failure to disclose this evidence because it was not deemed material to the defense, the crescendo rose. Justice Kagan asked the State's attorney whether her office "consider[ed] just confessing error" in the case, which was met with a dogged insistence by the attorney that the evidence was not material. [5] After more of the same, Justice Scalia finally interjected that the attorney "stop fighting as to whether it should be turned over," elaborating "Of course it should have been turned over…Why don't you give that up?" *Id*. at 51-52. More than two years after the Supreme Court's frustration with the concept that the materiality of exculpatory evidence is not a subject reserved to the discretion of a prosecutor, Neidhardt still didn't get it. How well-understood is this concept by our nation's highest court, is evinced by a more recent *per curiam* reversal of yet another Louisiana conviction involving another *Brady* violation, where the Court found that Louisiana "egregiously misapplied settled law," and did not even grant oral arguments. *See Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016).

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[4] http://www.scotusblog.com/2011/11/argument-recap-disaster-at-the-lectern/

[5] http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-8145.pdf , at p. 50. (last visited June 1, 2018).

The United States Supreme Court has proclaimed that it will not tolerate *Brady*/*Giglio*-type violations that are material. Respectfully, neither should this Court. Therefore, this Honorable Court should recommend that the Texas Court of Criminal Appeals reverse Whitley's conviction and remand for a new trial, on this alternative ground.

For the foregoing reasons, the Petitioner, Arthur Whitley, respectfully prays that this Court grant certiorari, and that it reverse the judgment of the Texas Fourth Court of Appeals.

Respectfully submitted,

GEORGE W. ARISTOTELIDIS
Requesting Appointment
In Forma Pauperis
Tower Life Building
310 South St. Mary's St.
Suite 1910
San Antonio, Texas 78205
(210) 277-1906 - Telephone
(844) 604-0131 - Telefax
jgaristo67@gmail.com

BRIEF DATE: September 3, 2019.

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

6/5/2019

WHITLEY, LATRAY **Tr. Ct. No. 2012CR7038A-W2** **WR-78,721-02**

This is to advise that the Court has denied without written order on the findings of the trial court after hearing the application for writ of habeas corpus. JUDGE YEARY DID NOT PARTICIPATE

Deana Williamson, Clerk

GEORGE WILLIAM ARISTOTELIDIS
LAW OFFICE OF JORGE G. ARISTOTELIDIS
TOWER LIFE BUILDING
SAN ANTONIO, TX 78205
* DELIVERED VIA E-MAIL *

No. 2012-CR-7038A-W2

EX PARTE	§	**IN THE DISTRICT COURT**
	§	**186TH JUDICIAL DISTRICT**
LATRAY M. WHITLEY	§	**BEXAR COUNTY, TEXAS**

ORDER

Applicant, Latray Whitley, through counsel Jorge Aristotelidis, has filed an application for a post-conviction writ of habeas corpus pursuant to Article 11.07 of the Texas Code of Criminal Procedure, collaterally attacking his conviction in cause number 2012-CR-7038A. TEX. CODE CRIM. PROC. art. 11.07.

HISTORY OF THE CASE

On May 9, 2013, the State convicted Applicant for murder. The jury sentenced Applicant on May 10, 2013, to life in the Texas Department of Criminal Justice – Institutional Division (TDCJ-ID).

On July 23, 2014, the Fourth Court of Appeals affirmed the judgment of the trial court. *Whitley v. State*, 04-13-00314-CR, 2014 WL 3611592 (Tex. App.—San Antonio July 23, 2014). A petition for discretionary review was due in the Court of Criminal Appeals on August 22, 2014. Mandate issued by the Fourth Court of Appeals on September 22, 2014. On October 24, 2014, Applicant submitted a Pro Se Petition for Discretionary Review; however, since the Fourth Court of Appeals had already issued a mandate in this case, the Court of Criminal Appeals took no action.

This second writ application was filed on August 21, 2015. The District Attorney received a copy of this application on August 27, 2015. The writ application has since been amended by writ counsel, and these findings address only the most recently filed amended writ application. Applicant is not barred from bringing this second writ application based upon the subsequent writ provision. Applicant's first application for writ of habeas corpus was dismissed on December 12, 2012 because it was filed pre-trial pursuant to Art. 11.07 § 1 (WR-78,721-01).

OPINION BY THE FOURTH COURT OF APPEALS

Applicant raised four issues on direct appeal:

(1) The trial court erred in not permitting Applicant to question a witness about bias.

(2) The trial court erred in not permitting Applicant to question witness, Reginald Green, about his conviction of a crime pursuant to Texas Rule of Evidence 609(b).

(3) The trial court erred in overruling Applicant's objection to the hearsay testimony of

Alvin Clark through Latoya Clark.

(4) The evidence was legally insufficient to support Applicant's conviction of murder.

The court of appeals's opinion sets out the facts of the case as follows, in pertinent part:

> In the early morning hours of November 8, 2009, Corey Cumby was shot and killed while he drove his car down an interstate in San Antonio, Texas. Cumby was a member of a gang called the East Terrace Gangsters. Appellant Whitley is a member of a rival gang, the Wheatley Court Gangsters. The night of November 8, 2009, Cumby had been at Club Studio, a nightclub in northeast San Antonio. He left the club alone, and as he waited behind a car in the left lane at a light near Loop 410, another car pulled alongside him in the right lane. When the light turned green, Cumby's car, the one alongside him, and the one behind him raced to Loop 410 and then to Interstate 35. The rear window on the driver's side of the car that had been alongside Cumby lowered, and several gunshots were fired at Cumby's car. Cumby's car exited the freeway and came to rest in a ditch off Interstate 35. A witness, Melissa Covarrubia, went to Cumby's car and found Cumby unresponsive. The medical examiner testified that the cause of Cumby's death was a gunshot wound and that the gun was not fired at a close distance.
>
> At trial, thirty-five-year-old **Alvin Clark** testified that on November 8, 2009, he was at [the] club. . . . As Clark left the club, he saw Cumby get into his car. Clark got into his own car and drove south on Perrin Beitel towards Loop 410. According to Clark, . . . [he] heard shots and . . . testified that Pooh (Whitley) was the one who was shooting at his and Cumby's cars. Clark heard eight shots. According to Clark, after the shooting, the car Peanut (Neally) was driving "flew" past him. The car then dropped back to Clark's car. Clark "took off" and heard another shot. He noticed that fire was coming out of the passenger's side in the back of his car. Clark testified that he did not see what happened to Cumby. . . .
>
> . . . Clark admitted that he has been convicted of being a felon in possession of a firearm. He testified he was currently under federal supervision for possession with intent to deliver cocaine. He testified that he did not have an agreement with the State to testify. . . .
>
> On cross-examination, . . . [w]hen the defense asked Clark whether he had a "Rule 35" agreement with the Federal Bureau of Prisons, Clark testified that he did not.
>
> . . . **Reginald Earl Green, Jr.** testified that he and Whitley had gotten to know each other when they were both incarcerated at "GEO," a federal holding facility. According to Green, Whitley told him that on the night Cumby was

killed, Whitley received a call directing him to come to Club Studio. He and his brothers drove a rental car to Club Studio to see "East Terrace gang members." Whitley said that he had been upset with Cumby, who was from a rival gang, because Cumby had bought "some rims" from Whitley's brother with counterfeit money. Green testified that Whitley said he was planning to follow Cumby. . . .

. . . According to Green, Whitley said that he and his brothers were "just going to follow them." "The hit wasn't supposed to happen on the highway." "It just so happened when they got on the highway, the opportunity presented itself because wasn't nobody [sic] on the highway but them [sic] cars." Whitley pulled up alongside Clark, and Clark accelerated faster. Then, Cumby accelerated so that Whitley's car was beside Cumby's car. Whitley, who was sitting in the back seat behind the driver, stuck his gun out of the window and shot five or six times. . . .

Whitley v. State, 2014 WL 11592 (Tex. App. – San Antonio July 23, 2014).

The first issue raised on appeal, related to witness bias, centered on whether witnesses Alvin Clark and Reginald Green testified more favorably toward the State in exchange for a reduction of their federal sentences. The court of appeals disposed of the argument pertaining to the alleged "Rule 35 agreement," by holding that Applicant failed to preserve the issue for appeal:

. . . In his first issue, Whitley argues that he "was not permitted to present to the jury evidence that a witness for the prosecution, Alvin Clark, was biased by a potential reduction in a federal prison sentence that he was serving." According to Whitley, a "Rule 35" agreement refers to Federal Rule of Criminal Procedure 35, which permits a witness to obtain a reduction to a witness's federal prison sentence. Whitley argues that "Clark was never questioned about the possibility of obtaining a 'Rule 35' agreement because he did not currently have one." According to Whitley, "if Mr. Clark had hopes or plans of obtaining one then it should have been admissible in front of the jury." "This provides a particularly powerful incentive for the witness to testify for the prosecution and the defense should have been permitted to explore the witness's bias." In support of this argument, Whitley points to page 87 of volume 3 of the reporter's record. On page 86 to 87 of volume 3 of the reporter's record, Clark is being cross-examined by Whitley's attorney. Clark testified that he was a federal prisoner in Floresville with Reginald Green:

Q: Are you familiar with—there's a rule in Bureau of Prisons, Rule 35. Are you familiar with that?

A: Yeah.

Q: Did you have a Rule 35 agreement?

A: No.

Q: Okay. Would you tell the ladies and gentlemen of the jury what Rule 35 is?

State: Objection. If he didn't have one, it's not relevant.

Defense: If he knows about it, Judge. He testified he knew about it.

Court: All right. Can I see the attorneys at the bench, please? (outside presence of jury)

Court: Are you about to go into one of the things we were talking about in the motion for limine, counsel?

Defense: (no response)

Court: Were you about to——

Defense: Yes, Judge. Yes, yes. I'm sorry.

Court: And what was the question you were asking?

Defense: If he was aware of the Rule 35.

Court: So tell me what a Rule 35 agreement is.

Defense: Rule 35 agreement is when they have an agreement with the Bureau of Prisons in return for providing information.

Court: Okay. Well, didn't I say that we were going to take that issue up outside the presence of the jury before we went into it in front of the jury?

Defense: Yes, ma'am. I'm sorry.

Court: All right.

Defense: I apologize.

Court: Don't do it again.... Ask the question. Let's see what the answers are.

(outside presence of jury)

Q: Are you familiar with what Rule 35 is?

A: Yeah, I heard what Rule 35 is, but I didn't have a Rule 35.

Q: Okay.

Court: Your objection is sustained. We're not going into that.
We'll resume at 1:15 p.m.

> On appeal, Whitley argues that he "wished to demonstrate that the witness was aware of a federal program that might have provided the opportunity for the witness to have time taken off of his sentence for cooperating with the prosecution of the Defendant." According to Whitley, "[w]hether the witness would have been able to obtain a reduction in sentence is not the issue; rather the possibility of obtaining one in the witness's mind and the accompanying motivation to testify in a way that would make that more or less likely is the issue that should have been addressed." However, as pointed out by the State, Whitley did not attempt to inquire about the potential of a future Rule 35 agreement between Clark and the Bureau of Prisons. Nor did he attempt to ask Clark if he believed his testimony would result in a sentence reduction. He did not argue to the trial court, or attempt to make a bill of exception, about Clark's belief of a potential agreement constituting bias. Only now on appeal does Whitley argue that the mere potential of a possible agreement was admissible evidence of bias under Texas Rule of Evidence 613(b). Whitley cannot now argue that the trial court limited his ability to impeach Clark about Clark's belief regarding a future agreement with the Bureau of Prisons when Whitley never made such an argument to the trial court. We find no abuse of discretion by the trial court. *See Montgomery v. State,* 810 S.W.2d 372, 387, 391 (Tex.Crim.App.1991) (opinion on reh'g) (holding that the trial court's rulings concerning the admissibility of evidence are reviewed for abuse of discretion).

Whitley v. State, 2014 WL 11592 (Tex. App. – San Antonio July 23, 2014) (emphasis added).

SECOND AMENDED APPLICATION FOR WRIT OF HABEAS CORPUS

On July 8, 2016, Applicant submitted a Memorandum in support of the instant application with additional exhibits. Applicant then submitted a First Amended Application for Writ of Habeas Corpus and an amended Memorandum in support of his application.

On May 24, 2018, Applicant submitted a "Corrected, Second Amended" Application for Writ of Habeas Corpus, and in June, 2018, Applicant filed a second amended memorandum in support of his habeas application. The allegations as addressed in these findings, as summarized below, come from the "Corrected, Second Amended" Application for Writ of Habeas Corpus:

1. **Applicant's First Ground for Relief – False Testimony**: The State's misleading representations and its failure to correct materially false testimony from its witnesses during Whitley's trial, violated Whitley's Due Process rights under the Fourteenth Amendment to the U.S. Constitution, as provided by *Napue v. Illinois*, 360 U.S. 264 (1959). Specifically, Applicant asserts that Clark received a reduction from 70 to 30 months in his federal sentence as a result of his debriefing about Cumby's murder

investigation with SAPD, prior to testifying at Whitley's trial, and Green's federal term of supervised release was terminated as a reward for his testimony after the trial. Applicant claims that, despite having copies of the agreements for both witnesses, the State prosecutor did not turn them over to Whitley's counsel but instead drafted and filed a response that withheld the impeaching content of the agreements, and misrepresented the terms of the motion. Applicant claims that, at trial, defense counsel asked Clark and Green whether they had Rule 35 agreements, which they both denied, and the prosecutor failed to correct this false testimony. According to Applicant, after Whitley's conviction and life sentence, the State wrote performance letters to the federal prosecutor, acknowledging the critical importance of Clark and Green's trial testimony, and as a result of the letters, the federal prosecutor, post-trial, did not recommend any further reductions for Clark, but asked the federal judge for a termination of Green's remaining term of supervised release, which was granted. Applicant claims that he was materially prejudiced by the State made written and oral misrepresentations, failed to correct its trial witnesses' denials about their respective Rule 35 agreements, and failed to disclose their clear expectations for future federal sentence reductions.

2. **Applicant's Second Ground for Relief–Prosecutorial Misconduct under *Giglio* and *Brady***: The State's failure to turn over impeaching evidence in the form of Clark and Green's cooperation agreements, constituted a Due Process violation under *Giglio v. United States*, 405 U.S. 150 (1972), and its progeny, that was material to Whitley's trial. Specifically, Applicant asserts that Clark was the only alleged eye-witness to Cumby's murder and Green testified that Whitley admitted to the murder. Applicant claims that there was no other testimony that supported Whitley's guilt. Applicant represents that the federal prosecutor noted in the motion to reduce Clark's federal sentence, that Clark came up with his eyewitness claim only after his second federal crack cocaine distribution arrest. Applicant claims that Clark's 30-month reduction reward before he testified at Whitley's trial was a "powerful incentive" for him to restate his account at trial with a full expectation of more reductions to follow. In addition, Green received a termination of federal term of supervised release after Whitley's trial because of his testimony at Whitley's trial. Applicant states that he relied on the State's written and oral misrepresentations about the impeaching nature of the agreements, and the State's suppression of the cooperation agreements undermined confidence in the outcome of the trial.

3. **Applicant's Third Ground for Relief–Prosecutorial Misconduct under *Giglio* and *Brady***: The State's failure to turn over impeaching evidence in the form of Green and Clark's lawyers' recorded agreements with an SAPD detective to consider rewarding Green and Clark with a reduction of their federal sentences was a material violation under *Giglio v. United States.* Specifically, Applicant claims that the State failed to turn over two recordings, each of SAPD Tom McNelly with Green and Clark's lawyers, Clark Adams and Scott McCrum. Applicant claims that Green and Clark directed their attorneys to contact McNelly and request that he consider recommending to the federal prosecutor that Green and Clark's federal sentences be reduced, (presumably in exchange for favorable testimony at Whitley's trial).

4. **Applicant's Fourth Ground for Relief--Trial Court Error**: The trial court's failure to *sua sponte* give a Texas Code of Criminal Procedure Art. 38.075(a) jury instruction violated Whitley's right to a fair and impartial trial.

5. **Applicant's Fifth Ground for Relief--Ineffective Assistance of Counsel**: Applicant's trial counsel rendered ineffective assistance of counsel for failure to request an Art. 38.075(a) jury instruction and for failure to obtain the federal cooperation documentation. Applicant also claims that his counsel was ineffective for failing to obtain copies of the federal plea agreement and plea agreement supplements after being notified of their existence by the prosecution.

FEDERAL SENTENCING RULES AND GUIDELINES

Since this writ application refers to federal sentencing rules and guidelines, below is a brief summary of applicable federal sentencing procedures.

a. As in all pleas, the ultimate question in both state and federal prosecutions is how much time a defendant will spend in prison (if any at all). In the federal system, the range of punishment is governed by three factors: the relevant criminal statute, the Federal Rules of Criminal Procedure, and the United States Sentencing Guidelines (hereinafter the USSG).

b. As in both state and federal criminal justice systems, the relevant criminal statute sets both the floor and the ceiling for an offense's sentencing range.

c. Yet, in the federal system, federal judges are also bound to apply the USSG before selecting the term of imprisonment within the statutory punishment range. The USSG provides the judge a "range within a range." The USSG will indicate to the judge where within statute's sentencing range the judge may impose sentence. For instance, if the statute's sentencing range is 0-20 years, then the application of the USSG may bind the judge to a mini-range of 80-100 months (depending on numerous factors contain within the USSG). The judge should sentence within the USSG's range even though the statute calls for a wider range. There are means for a judge to depart from the USSG (upwardly or downwardly), but those means are not at issue here.

d. In addition, the Federal Rules of Criminal Procedure have a post-sentencing rule that may provide relief to an inmate who demonstrates exemplary behavior following incarceration. Fed. Rule Crim. Proc. 35. This rule is known as "Rule 35."

e. A federal statute's sentencing range is self-explanatory, and Rule 35 is fairly simple to explain, but the USSG has more complicated mechanisms. The USSG issues are usually addressed extensively in written plea bargains. Note that in the federal system, a judge is not bound by a plea bargain, and the defendant usually is NOT permitted to withdraw the plea if the judge disregards the agreement.

Consequently, despite having a plea bargain in hand, the defendant acknowledges during his plea that he is essentially pleading in the open and will rely upon the USSG. Therefore, the USSG is central to federal sentencing and the defense's focus is to bargain in ways to favorably affect the USSG.

f. Pertinent to this writ is the application of USSG § 5K1. This section of the USSG allows the sentencing judge to depart from the normal USSG guideline amount based on the defendant's cooperation with the Government. This is called the "downward departure" and most defense attorneys actively contact the Government to have their clients cooperate with the Government during the plea bargaining process in order to gain a downward departure. It is likely that nearly every Federal plea bargain agreement since the USSG came into effect in the late 1980's contains language regarding a defendant's cooperation under USSG § 5K1.

g. The cooperation usually consists of a defendant debriefing law enforcement about all illegal activities of which the defendant is aware. The common language used in *federal plea bargain agreements* provides that the defendant "fully cooperate in the investigation and prosecution of any and all known criminal transactions." These agreements also normally include an obligation to render "truthful testimony... in Court and at trial concerning any illegal matter known to defendant." This language is generally understood to mean that the defendant will testify against co-defendants at their trials, if any.

h. Once a defendant has fully and truthfully debriefed, the Assistant US Attorney will file a sealed motion to the court requesting a USSG § 5K1 downward departure. These motions are sealed to protect the defendants from retribution for having "snitched" on others. Although not bound to grant the motion, most federal judges grant USSG § 5K1 motions in the hope that future defendants will see the advantage of debriefing with the Government. These debriefs often allow federal law enforcement officials to solve many other crimes.

i. Federal Rule of Criminal Procedure 35 ("Rule 35") is not an agreement, but instead is a device that encourages "substantial assistance" by defendants who have already been sentenced. If a defendant, post-sentencing, provides substantial assistance in investigating or prosecuting another person, the defendant may be awarded with a Rule 35 motion to the sentencing court. At the discretion of the Government, an Assistant US Attorney may move the sentencing court to lower a previously imposed sentence. Rule 35 even provides that the sentencing court may impose a new sentence that is below the statutory minimum; however, the sentencing court may disregard a Rule 35 motion and there is no appeal for this denial.

j. There can *never* be an agreement for Rule 35 because all inmates or probationers are required to comport to good conduct. And it is difficult to see how an inmate

or probationer could agree (or not agree) to the exemplary conduct envisioned by Rule 35.

k. Federal plea bargains allow for the filing of a motion for downward departure. Furthermore, the language allowing for the motion which is included in a plea agreement with the Federal Government is standard language and not tailored in anticipation of testimony.

l. The filing of a motion for downward departure pursuant to USSG § 5K1.1 20 and/or Rule 35 is governed by statute and awarding a reduced sentence is within the discretion of the federal court.

FINDINGS OF FACT (WRIT HEARINGS)

This court held hearings on Applicant's habeas application on January 20, 2017, February 17, 2017, March 24, 2017, and July 21, 2017. The following findings are based on the testimony elicited by Applicant and the State at those hearings.

1. **Writ Hearing January 20, 2017**

a. David Shearer, an Assistant United States Attorney, testified at the January 20, 2017 writ hearing that he prosecuted Reginald Green "many years ago." He was shown a copy of Green's plea agreement dated June 8, 2010. Shearer testified that a plea agreement is a "like a contract," signed by all the parties. Shearer stated that Green's plea agreement was standard (with boilerplate type language) and contained language to the effect that if the defendant provides information about other state or federal offenses, that could result in a reduction of his sentence.

b. Tanner Neidhardt was the Assistant District Attorney who prosecuted Applicant in this case. Shearer testified at the writ hearing that he never met Neidhardt, but was told via e-mail by Neidhardt after Applicant's trial that Green testified as a State's witness against Applicant.

c. Shearer testified that Alvin Clark did not come forward with information about Applicant's case until 2011, after being charged in his federal case. Clark's lawyer, Scott McCrum, approached Shearer about having information regarding a murder investigation. Shearer agreed to ask for a Rule 35 sentence reduction for Clark. He confirmed that Clark received a reduction in part because of his cooperation related to Applicant's case. (This all occurred before the trial in this case).

d. Shearer testified that he sent Neidhardt Clark's and Green's plea agreements, and that Neidhardt acknowledged receiving them and thanked Shearer because he needed to pass them along to defense counsel in this case.

e. Shearer also acknowledged that he was copied on an e-mail from prosecutors in Applicant's trial to Clark's attorney, Scott McCrum. The e-mail stated that Clark testified in Applicant's trial, and his testimony was "difficult and unclear." However, Neidhardt confirmed that they could not have gotten a guilty verdict without Clark's participation. "He had to testify as he was the only willing, quote unquote, eye witness."

f. Shearer stated that the reason that he was copied on this e-mail was because "over a period of probably six months, Scott McCrum repeatedly asked me for a Rule 35 for Mr. Clark." However, Shearer's supervisor in the U.S. Attorney's Office did not authorize a reduction of Clark's sentence, so Clark "did not get a Rule 35."

g. Shearer testified that he remembered that Green provided substantial cooperation that was considered by the federal court in granting a reduction in his sentence.

h. One of the exhibits to the hearing is the August 22, 2011, Government's Motion for Downward Departure Pursuant to USSG Section 5K1.1. This motion detailed Green's pre-sentence cooperation with federal agents regarding other state and federal drug offenses (not the Cumby murder). This motion was granted, and Green's initial sentence was reduced.

i. When Green was on supervised release, the Federal Government filed another motion for reduction on October 2, 2013. This motion was filed pursuant to Rule 35. In this motion, Shearer reiterated Green's cooperation regarding the various pre-sentence drug offenses. He also included the information given to him by Tanner Neidhardt that Green had been "hesitant but helpful," and "did not want to testify but agreed he would." The federal motion for reduction was granted, and Green obtained a reduction with regard to his federal supervised release.

j. Another writ exhibit is the March 19, 2012, Government's Motion for Downward Departure Pursuant to USSG Section 5K1.1 related to Alvin Clark's cooperation in helping SAPD solve this case. Specifically, this federal motion notes that Clark "claims to have witnessed his cousin, Latrelle [*sic*] Whitley, commit a murder in 2009 (note, Defendant did not come forward with this information until 2011, after being charged in this case)." This motion was granted, and Clark received a reduction on his federal drug charge prior to testifying in Applicant's trial.

k. Shearer noted that the plea agreement language states that the defendant understands that, if the defendant has provided "substantial assistance," whether to file a motion for a downward departure is still in the government's discretion. The agreement to ask for a downward departure is conditioned upon the defendant telling "the absolute truth, not what the defendant thinks the government wants to hear."

l. Shearer confirmed that, with regard to Rule 35, "there are no promises made," but rather it is a reward for something already done.

m. This court finds that David Shearer's testimony at the writ hearing was credible.

2. **Writ Hearing February 17, 2017**

a. Juan Aguilera, who was the trial counsel for Applicant, testified that he filed a motion for discovery, which asked for "all inducements offered by the State which might tend to motivate any witnesses to testify against Defendant, including but not limited to plea bargain agreements, fee, expense, or reward arrangements, agreements to dismiss, or reduce or not bring charges or other agreement of leniency."

b. This part of the discovery motion was granted by the trial judge.

c. Aguilera also requested that the court order the State to disclose all evidence in its possession that is favorable to the defendant and material to guilty or punishment, including impeachment evidence.

d. That request, too, was granted.

e. Aguilera testified that he did not receive any documentation from the state regarding any federal plea bargains. He stated that his understanding was that there were no agreements with the federal government or with the state regarding any kind of favorable treatment for the testimony of Green or Clark in Applicant's trial.

f. Aguilera stated that he was not told by the prosecution that Clark received a reduction in his federal sentence before trial. He said he understood there was no documentation of any agreement, and he even asked the witnesses whether they had any agreements regarding getting favorable treatment for their testimony. Aguilera said that he repeatedly asked about whether there were any "Rule 35 agreements."

g. Aguilera admitted that he had no experience handling federal cases. He had never entered into a plea agreement in a federal court in a criminal case.

h. Aguilera agreed that Green and Clark were the only two witnesses that testified directly as to any evidence involving Applicant in this matter.

i. Aguilera stated that the State filed, in response to the court's order, a pleading stating that there were no agreements with witnesses.

j. Aguilera said that the trial court judge would not allow him to go into testimony

from each of those witnesses about whether or not they had a "Rule 35 agreement" or some such sort of benefit from the federal government from testifying in this case.

k. Aguilera did admit that he presented evidence in Applicant's trial about the criminal history of these two witnesses, which included references to their federal prison time.

l. This court finds that Juan Aguilera's testimony was credible.

3. **Writ Hearing March 24, 2017**

a. Clark Adams and Scott McCrum testified at this hearing. Adams was the attorney who represented Reginald Green in federal court, and McCrum represented Alvin Clark in federal court.

b. This court finds that Mr. Adams and Mr. McCrum were credible witnesses.

4. **Writ Hearing July 17, 2017**

a. Tanner Neidhardt testified at this writ hearing.

b. Neidhardt said that he did not remember receiving Green's or Clark's federal plea agreements from David Shearer via e-mail.

c. Neidhardt said that he did not believe he had a duty to tell defense counsel about the document that said that if Clark gives assistance on this case, he could be rewarded via Rule 35, since he wasn't rewarded ahead of time, but only could be rewarded by federal authorities if he gives further assistance.

d. Neidhardt said that the defense attorney knew there was a Rule 35 clause within the plea agreement for Alvin Clark. Neidhardt did not believe that there was an advance "agreement" with Clark to testify favorably in the murder case in exchange for a reduction in his federal sentence.

e. When asked about his statement that he needed to "pass along" the actual plea documents to defense counsel, Neidhardt stated that initially he thought he had to pass along plea agreements to the defense. But, Neidhardt then stated that he did not think federal plea agreements represented exculpatory evidence, or that they represented agreements between the federal government and these witnesses to testify *in this case*, or that they were agreements between the federal prosecutor and Neidhardt regarding these witnesses and whether they should testify in this case.

f. Neidhardt testified that, "in this case, there was no agreement either before, after or during, or before, during or after in regards to an agreement for those witnesses

in exchange for them to testify. . . . The state made no agreements with witnesses in exchange for their testimony."

g. When asked, "What if you find out that the witnesses have an expectation or hope to get leniency from a federal prosecutor if they testify in your trial," Neidhardt answered, "I don't know what the witnesses' expectations are." Neidhardt stated that he "spoke to both witnesses in this case and clearly conveyed that there was no – there should be no expectation that they would get anything for their testimony in this case."

h. Neidhardt said that he "never said to anyone that [he] would give a favorable recommendation."

i. Neidhardt said that he would "never agree" to considering "whether or not at some point their testimony was so good that [he] would give a favorable recommendation."

j. Neidhardt admitted that he "imagine[d] that [the witnesses' defense attorneys] wanted to get a good recommendation but ... [he] never agreed to give a good recommendation."

k. Before trial, Neidhardt filed and provided to the defense the State's Response to Defendant's Request for Agreements with Witnesses. In that pleading, Neidhardt informed trial counsel that "the State has made no agreements with witnesses in exchange for testimony." Neidhardt informed trial counsel of Green's federal case and Clark's federal case, but advised that "no information related to the present case was included as the basis for the United States Government's recommendation regarding his sentence."

l. Neidhardt informed the defense that Clark's federal plea agreement included language that Clark must cooperate with the United States Government in all criminal transactions known to Clark, but that there was no language in the plea agreement regarding Clark's future cooperation *in the present case*.

m. When asked about why he did not tell the defense counsel that the witness gave information to the Feds about this murder case that allowed him to get a reduction, Neidhardt stated that the defense attorney knew that the witness gave information to law enforcement regarding this case.

n. Neidhardt maintained that the fact that Clark had already cooperated in his federal case by giving state detectives information about this murder was "not an agreement" and did not evidence that he would *further* benefit his federal case if he testified favorable for the State at the trial in this case.

o. Neidhardt said that he "believed it the whole time," and he "still believe[s] it

today that when [he] spoke to Mr. Reginald Green, he had no agreement, he had no understanding . . . that he was going to get any benefit but he was subpoenaed and he was in jail and I could put him up on the stand. What he decided to do afterwards is what he decided to do."

p. Neidhardt testified that, although the witnesses may have been looking for a benefit, that is not why they cooperated. They cooperated because they were "subpoenaed." Clark was on federal parole – had he failed to answer the subpoena, he could have gotten in trouble.

q. Neidhardt testified that he "never agreed to give [Clark and Green] a favorable recommendation for testifying." He said he gave an "evaluation of their testimony," not a "favorable recommendation."

r. And in fact, said Neidhardt, he believed that Green believed that he would get no advantages from his testimony and that made him a more credible witness.

s. This court finds that Tanner Neidhardt's testimony at the writ hearing was credible with one exception—his statement that he did not remember receiving Clark's and Green's federal plea agreements. The court finds that Mr. Neidhardt did in fact receive copies of Clark's and Green's federal plea agreements, which were under seal, before trial in this case, and that he failed to provide defense counsel with copies of such agreements.

ADDITIONAL FINDINGS OF FACT

5. It was undisputed that Corey Cumby was shot and killed in his car on November 8, 2009, from a nine millimeter gun as he was travelling on I-35.

6. Latoya Clark testified that she was Alvin Clark's wife, but that they were not currently together. She stated that, on the night of the murder, Alvin Clark called her, and that he was "scared" and was "yelling." She said that Clark told her that "he was being shot at." She said Clark told her that "Pooh" and "Sleazy" were the ones shooting at Clark's car. She confirmed that Clark told her this before he went to federal prison.

7. Alvin Clark and Reginald Green testified that Applicant's nickname was "Pooh."

8. There was a bullet hole in the car that Clark was driving that night that had not been there the night before.

9. Donald Grinage testified that he was at the club that night, and that he left at closing time. Grinage stated that he was at a light, and there were two cars in front of him – one to the right and one in front, and when the light changed, "the cars took off." Grinage stated that the victim's car was in front of him, and there was a small black four-door car in front of the victim's car with two "black people" in it. Grinage testified that he was

driving behind the two cars on the highway and he saw "a hand come out the little black car shooting at Corey's car." Grinage's testimony corroborated Clark's and Green's testimony that someone shot at the victim's (Corey Cumby's) car on the highway.

10. The medical examiner testified that the cause of the victim's death was a gunshot wound and that the gun was not fired at a close distance.

11. In Applicant's supporting memorandum, he quotes from a transcript of the pretrial hearing in this case that illustrates that defense counsel was aware that Clark and Green could potentially benefit their federal sentences if they cooperate in this case by testifying favorably for the State. Defense counsel asked the trial judge to be able to explore with these witnesses their knowledge that they would get a federal benefit from testifying in this case. *The trial judge (and the prosecution) agreed that if the witness knows he will get a benefit in his federal case from testifying in this case, then that is admissible impeachment.*

12. Whether Clark and Green had agreements with the State and/or with the federal government to testify favorably in this case was an issue that was explored pretrial. The following exchange occurred before trial began:

PROSECUTION: Next, Number 3, that the State has made any agreements with witnesses in exchange for testimony. Judge, on that, you ordered the State to hand over any agreements. That's been filed for I think since April 15th, and in it it states that the State has made no agreements with any witnesses in exchange for testimony.

COURT: Very well.

DEFENSE: But that's already been provided to us, Judge.

COURT: All right.

PROSECUTION: The next one, Number 4, Reginald Green, one of the witnesses, that he – stating that he gave any information related to the present case that was included as the basis for the United States Government's recommendation regarding his sentence. So the important thing about that one, Reginald Green is on probation. Or I'm sorry, he is in federal custody right now. He told information about this case to someone. I have gone through the sealed files and provided it to the defense attorney the – what it is, and there is no agreement that he received any consideration in order for a lower sentence in Reginald Green's case.

DEFENSE: And Judge, in that regard, that may be the situation as far as the sentencing.

COURT: Uh-huh.

DEFENSE: We would like to go into the fact that there is a federal program where you could provide information and you can get your sentence reduced once even after you've already been sentenced. So we would like to at least go into that. We think that may be the basis of his sentence being reduced quite a bit in this situation.

COURT: For his testimony in this case.

DEFENSE: Uh-huh.

PROSECUTION: And that's the point that I make. In that document, which I provided – I provided the summary to the defense attorney, there – they say here are what you are getting credit for. Now, he's talked about other things. But here's what you get credit for in regards to the United States Government's recommendation, and nothing is related to this case that affected the government's recommendation regarding his sentence.

DEFENSE: But under the Bureau of Prisons, under the Federal – the way they work, if you provide information subsequent to being incarcerated, it can work towards reducing your sentence.

COURT: But won't it be set out, then, in the document that the State's referring to?

DEFENSE: No. No. No, ma'am. That's totally something between the prisoner and the – the authorities, The Bureau of Prisons.

COURT: Well, okay. So are you saying that he would know that he's going to get that benefit now? Or are you saying that that's something later on that –

DEFENSE: That he may have already gotten that benefit, Judge.

COURT: Would he know that?

DEFENSE: Yes.

COURT: All right. Well, what to you say with regard to that?

PROSECUTION: Well, if he got a benefit, then there would be documentation of it and there is not. There is the only – when – when he spoke to them previously, he was in custody because they took him into custody before he pleaded. In his plea agreement, any information

regarding this case was not included as a part of the recommendation for his sentence. So there is no document that says because of the State v. Whitley, you are also getting credit.

COURT: Okay. I understand that. But what are you saying? You're saying, yeah, but that's not what you're talking about? You're talking about –

DEFENSE: Post-conviction, post-incarceration.

COURT: Like a – parallel to the Parole Board looking at someone and saying –

DEFENSE: Yeah. He—he—

COURT: But then you don't know that in advance.

DEFENSE: Right. I wouldn't know that in advance. He would have to have information –

COURT: The witness would have that –

DEFENSE: The witness would be – yes.

COURT: I mean, people that get sentenced to the penitentiary don't know in advance what the Parole board is going to consider –

DEFENSE: No, no, no. But what he does, here – we're – our allegation is that he's approached the Bureau of Prison authorities and said, Hey, look I can provide this information on this particular case and I wanted to testify. And in return, they can reduce the sentence.

COURT: And they would have already told him about that and he would know about it right now?

DEFENSE: Yes.

COURT: Well, all I can say is we've got to see if he knows about it. Because if he does, then he got a benefit. I'm going to let them go into it.

PROSECUTION: Sure. Absolutely, if he got a benefit.

COURT: Okay. So this is a factual dispute here right now to be determined by what your witness will say outside the presence of the jury.

PROSECUTION: That's what we're asking for, Judge.

COURT: All right. That's fine.

PROSECUTION: The next is regarding Alvin Clark, another witness, that no language in the agreement . . . between the United States attorney and Alvin Clark regards participating with the State in the present case. So he made no agreement when they – when he did his pleading, there was no agreement. That says, and as part of your deal, whatever the deal is, you have to show up for the State. His agreement is – only regards what is required of him for the federal government, not for the State.

COURT: Clarify that last statement. What is the agreement that he's in with the federal government? Is it –

PROSECUTION: That he gave information on federal cases.

COURT: All right.

PROSECUTION: And in regards to this case, there is no agreement between the United States attorney where they say, Oh, yes, for this deal, you have to go testify in the case of State v. Whitley.

COURT: What says the –

DEFENSE: Same argument, Judge.

COURT: All right, then. We're going to have a hearing.

* * *

PROSECUTION: Reginald Green again. So now we've talked about – 4 and 5 were about agreements to testify. 6 and 7 is that there is any agreement between the State and the United States Government to reduce his sentence based on the testimony in the present case. Now, that's unique. That's kind of what he's talking about is afterwards.

COURT: Uh-huh.

PROSECUTION: That we've made some sort of deal with the U.S. Government because they're the ones who control his sentence on those federal cases.

COURT: Uh-huh.

PROSECUTION: There is no agreement between the State and the Government saying, Hey, you guys reduce afterwards.

COURT: So you're not going to call them later and tell them how these witnesses did on the stand?

PROSECUTION: I have no intention to do that. But if I am called, I will tell them how they did on the stand.

COURT: What says the Defense?

PROSECUTION: I mean, that's what I'm saying. I have no agreement to do any of that.

COURT: Okay.

PROSECUTION: But if I am asked and they testify truthfully, my answer will be, They testified truthfully.

DEFENSE: That's my understanding, that they don't have an agreement. And usually the federal government doesn't really care what the State has to say anyway so –

COURT: All right. So you're good with that that there's no – that there's no agreement and so –

DEFENSE: I think that's been presented to us already –

COURT: Okay.

DEFENSE: -- previously, that there was no agreement. So that's fine.

13. In defense counsel's opening statement, he tells the jury that the witnesses (referring to Alvin Clark and Reginald Green), who are both "in federal custody," "have reason to come in here and tell you a story because they're going to get some – it's going to be to their benefit to come up here and give that story."

14. Alvin Clark testified that:

a) He was at the same club that night "hanging out" where Corey Cumby and Latray Whitley had been.

b) Clark said that he left in his car, Corey Cumby left in a dark blue car, and his cousin, Latray Whitley, and Latray's brother, Hollis Nealy, left in their car all about the same time. Hollis was driving and Latray was in the backseat driver's side.

c) He said that he stopped at a light, and Cumby was behind him and Latray and Hollis were beside him. Clark testified that as the three cars were entering and driving on the highway he "heard shots" and Latray's car were close to him, he

heard more shots, and they "flew past" him and "let off a shot." He said that he looked, and ducked, and saw "fire coming out" of the back driver's side of the car Hollis was driving. Clark said that after he heard the shots he "took off." He said that they shot at his car too.

d) Clark testified that he was currently under federal supervision for possession with intent to deliver cocaine. He said he was living in a halfway house.

e) The prosecution asked whether he had any agreement with the State, or with the DA's office to testify today. Clark responded that he showed up because he "got subpoenaed."

f) Clark said he did not report the shooting to the police after it happened because he "wanted revenge."

15. On cross-examination, defense counsel, Juan Aguilera, attempted to impeach Clark with his federal plea agreement:

DEFENSE: And why was it that you on that particular – November the 8th, when all this thing happened, you didn't go home, call the police and say, Hey, I just saw a shooting. This person I saw did the shooting. Why didn't you give them that information?

CLARK: That ain't what we do.

DEFENSE: So, basically you said you get revenge?

CLARK: Yeah.

DEFENSE: Okay. Why were you trying to get revenge against your cousin Latray?

CLARK: Why did he shoot at me?

DEFENSE: Okay. Did it have anything to do that your mama Earline Houston told you to make up a story about Latray being the shooter?

CLARK: No.

DEFENSE: She didn't have any axe to grind with your Uncle Arthur Whitley testifying against your brother Robert Thorn?

CLARK: No.

* * *

DEFENSE: As a matter of fact, you contacted the authorities to give them your

story, didn't you?

CLARK: Someone else was in there with me.

* * *

DEFENSE: Ya'll contacted them together?

CLARK: Yeah, he did.

DEFENSE: Okay. And then they came and talked to you about it?

CLARK: Yeah.

DEFENSE: That person was who, Reginald Green?

CLARK: Yeah, yeah.

DEFENSE: Okay. Were ya'll incarcerated together?

CLARK: We were locked up in the same place.

* * *

DEFENSE: Were you a federal prisoner at that time?

CLARK: Yeah.

DEFENSE: Had you already been sentenced or were you awaiting sentencing?

CLARK: I think I was already sentenced.

DEFENSE: Okay. Are you familiar with – there's a rule in Bureau of Prisons, Rule 35. Are you familiar with that?

CLARK: Yeah.

DEFENSE: Did you have a Rule 35 agreement?

CLARK: No.

DEFENSE: Okay. Would you tell the Ladies and Gentlemen of the Jury what Rule 35 is?

PROSECUTION: Objection. If he didn't have one, it's not relevant.

DEFENSE: If he knows about it, Judge. He testified he knew about it.

COURT: All right. Can I see the attorneys at the bench, please?

(At the bench outside the presence of the jury).

COURT: Are you about to go into one of the things we were talking about in the motion in limine, Counsel?

DEFENSE: Yes, Judge. Yes, yes. I'm sorry.

COURT: And what was the question you were asking?

DEFENSE: If he was aware of the Rule 35.

COURT: So tell me what a Rule 35 agreement is.

DEFENSE: Rule 35 agreement is when they have an agreement with the Bureau of Prisons in return for providing information.

COURT: Okay. Well, didn't I say that we were going to take that issue up outside the presence of the jury before we went into it in front of the jury? . . . Ask the question. Let's see what the answers are.

DEFENSE: Are you familiar with what Rule 35 is?

CLARK: Yeah, I heard what Rule 35 is, but I didn't have a Rule 35.

DEFENSE: Okay.

COURT: Your objection is sustained. We're not going into that.

16. Reginald Green testified outside the presence of the jury that he did not have a Rule 35 agreement with the Government:

DEFENSE: Mr. Green, you're currently incarcerated in – with the Federal Bureau of Prisons; is that correct?

GREEN: Yes.

DEFENSE: And where are you incarcerated?

GREEN: At. FCI Florence, Colorado.

DEFENSE: Okay. And do you – are you familiar with Rule 35 with the Bureau of Prisons?

GREEN: Rule 35? No.

DEFENSE: Where you make an agreement with the Bureau of Prisons and they reduce your term?

GREEN: Yes. Yeah, yeah.

DEFENSE: Are you familiar with that?

GREEN: Yes.

DEFENSE: Do you have a Rule 35 agreement if you come and testify in this case that you will receive – that they'll give you credit on your sentence?

GREEN: No, I do not.

DEFENSE: You don't have –

GREEN: No, I do not.

COURT: Will that be it? Is that it?

DEFENSE: Yes, ma'am.

17. Defense counsel did not make any further attempt to impeach these witnesses with questions regarding having a self-serving motive to testify for the State based on the possibility of gaining a benefit on their federal sentences.

18. This court finds that the denials by Clark and Green about having a "Rule 35 agreement," are credible. Neither witness had entered into any "agreement" with federal prosecutors or with the State to testify favorably *in this case or in any other case* in exchange for a reduced federal sentence. Therefore, the court finds there was no false testimony given at Applicant's trial.

19. This court finds that the only "agreements" were federal plea agreements that Clark and Green had entered into in their respective federal cases. Those agreements preceded their testimony in this case and related only to their federal cases.

20. Applicant argues that Green's and Clark's recorded meetings with state detectives in 2011 (two years before this trial) constituted "agreements" to testify favorably for the State and should have been disclosed to defense counsel.

    a) Green and Clark, through their federal attorneys, contacted state detectives to provide information related to the murder of Corey Cumby almost two years before Applicant's trial.

    b) Green and Clark obtained reductions on their federal sentences in exchange for providing state authorities such information regarding this case.

c) The benefit that Green and Clark was received long before the trial in this case.

d) There was no promise or agreement made by state detectives that Green and/or Clark would receive any more favorable treatment than they already had received for having provided that information and for testifying at this trial.

21. Neidhardt disclosed to defense counsel the existence of the witnesses' federal plea agreements in the State's Response to Defendant's Request for Agreements With Witnesses. This summary Neidhardt provided to defense counsel prior to trial truthfully stated that no actual agreements were made by the State in exchange for the testimony given by either Clark or Green in this case. The State's Response to Defendant's Request for Agreements With Witnesses contained the following statements, in pertinent part:

a) The State has made no agreements with witnesses in exchange for testimony.

b) Witness Reginald Green entered a plea agreement in his federal case styled SA-09-CR-772(2) OLG. However, no information related to the present case was included as the basis for the United States Government's recommendation regarding his sentence. The federal court sealed the documents related to that recommendation and agreement.

c) Witness Alvin Clark entered a plea agreement in his federal case styled SA-10-CR-865(1) (HLH). His plea agreement included language that Clark must cooperate with the United States Government and United States Attorney in all criminal transactions known to Clark. No language in the agreement regarded Defendant's participation with the State in the present case. At sentencing, Clark received a reduced sentence for providing assistance to law enforcement officers. The sentencing documents recognized that Clark had knowledge of the present case but did not specify that any debriefing had occurred between law enforcement officers and Clark that served as a basis for the Government's recommendation. Further, no future testimony regarding Clark's knowledge of the present case was a basis for those recommendations. The federal court has sentenced Clark. The federal court sealed the documents related to the United States Government's recommendations and Clark's plea agreement.

d) There is no agreement between the State and United States Government to reduce Green's or Clark's sentences based on testimony in the present case.

22. The court finds that the statements made in the State's Response to Defendant's Request for Agreements with Witnesses are true and correct.

23. The court finds that defense counsel was alerted to the fact that Green and Clark had entered into federal plea agreements in cases for which they had already been sentenced. Defense counsel argued at trial that Clark and Green would be benefitted in those cases by giving favorable testimony in this case.

24. The trial court is unaware whether defense counsel, knowing such plea agreements existed, ever attempted to have the federal plea bargain agreements unsealed so that defense counsel could use such plea agreements to impeach Clark and Green.

25. After this trial, Alvin Clark's federal attorney, Scott McCrum, e-mailed Tanner Neidhardt on July 15, 2013, requesting that he provide written confirmation of Alvin Clark's cooperation regarding Whitley's murder trial. By e-mail dated August 1, 2013, Tanner Neidhardt detailed the lack of cooperation of Alvin Clark: "On the day of trial in State v. Latray Whitley, Mr. Clark arrived, was disgruntled, would not allow for appropriate pretrial interview, but did not walk out either. When called to the stand, he testified. His testimony was difficult and unclear. However, we could not have gotten a guilty verdict without his participation. He had to testify as the only 'willing' eyewitness."

26. By e-mail dated July 17, 2013, Tanner Neidhardt contacted Clark Adams, Reginald Green's federal attorney:

> Thanks for asking about Reginald Green. He testified as a State's witness in State v. Latray Whitley (2012CR7038A). Green had been a cellmate with Whitley and testified to what Whitley had told him about the case. A jury found Whitley guilty of Murder and sentenced him to Life.
>
> . . . As far as Green's cooperation with the prosecutors who interviewed him prior to trial, he was hesitant but helpful. He did not want to testify but agreed he would.
>
> Green's in-court testimony was better than expected. He was thorough and thoughtful to questioning. He was clear and concise. He was very effective. I have no reservation in saying he was the most effective witness in the State's case.
>
> Furthermore, Green testified while fearful of his safety. He did so without any agreement for less time on his federal case. In fact, I thought he believed he would get no advantages from his testimony, and I believe this made him a more credible witness. I point this out because it appeared to us that he was testifying without any advantages for himself. My point is to say he testified for the State without demands or expectations.

27. The trial court finds the e-mails sent by Tanner Neidhardt to be credible. The court finds that Neidhardt's statement at trial, that he would only report to federal authorities regarding Green's and Clark's testimony in this case if they asked, was truthful and credible. Thus, the court believes that Neidhardt only provided that information to federal authorities because Green's and Clark's lawyers requested him to after the trial in this case.

28. David Shearer, the Assistant United States Attorney assigned to Clark and Green's cases, then exercised his own discretion in deciding whether to file a motion for downward

departure.

29. The trial court finds credible the assertion that neither witness had any realistic expectation that they would obtain further benefit in their federal cases for testifying in this trial since they both had already obtained reductions in their sentences for cooperating in this case.

30. With regard to Applicant's claims related to Article 38.075, trial counsel failed to request a jury instruction under 38.075 of the Code of Criminal Procedure. Counsel conceded that he was unaware that Art. 38.075 existed and that it was not trial strategy to not request the instruction. Art. 38.075 requires corroborating evidence before a defendant can be convicted of an offense on the testimony of a person to whom the defendant made a statement against the defendant's interest during a time when the person was imprisoned or confined in the same correctional facility as the defendant. Corroboration is not sufficient if the corroboration only shows that the offense was committed *See* TEX. CODE CRIM. PROC. Art. 38.075(a).

31. The trial court did not give a *sua sponte* instruction pursuant to Art. 38.075(a).

APPLICATION OF LAW TO FACTS

Ground 1 – False Testimony

1. The use of material false evidence to procure a conviction violates a defendant's due-process rights under the Fifth and Fourteenth amendments to the United States Constitution. *Ex parte De La Cruz* , 466 S.W.3d 855, 865 (Tex. Crim. App. 2015); *Ex parte Weinstein*, 421 S.W.3d 656, 664 (Tex. Crim. App. 2014); *Napue v. Illinois,* 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

2. A conviction based on such materially false evidence results in a due-process violation, regardless of whether the falsity of the evidence is known to the State at the time of trial. *Ex parte Ghahremani,* 332 S.W.3d 470, 478 (Tex.Crim.App.2011); *Ex parte Robbins,* 360 S.W.3d 446, 460 (Tex.Crim.App.2011).

3. In order to be entitled to post-conviction habeas relief on the basis of false evidence, an applicant must show that (1) false evidence was presented at his trial and (2) the false evidence was material to the jury's verdict of guilt. *See Weinstein,* 421 S.W.3d at 659, 665. An applicant must prove the two prongs of his false-evidence claim by a preponderance of the evidence. *See id.*

4. In determining whether a particular piece of evidence has been demonstrated to be false, the relevant question is whether the testimony, taken as a whole, gives the jury a false impression. *Ghahremani,* 332 S.W.3d at 479.

5. With regard to whether Clark's testimony was false,

a) There is no evidence that Clark testified favorably for the State based on having already received a reduced sentence on his federal offense.

b) There is no evidence that Clark testified favorably for the State based on an expectation that he would receive a reduction in his federal sentence.

c) There is no evidence that Clark received any benefit after he testified in Applicant's trial.

d) Clark gave state authorities information in 2011 regarding Cumby's murder that helped the prosecution in this case.

e) Clark received a benefit on his federal sentence for giving this information to the state.

f) This occurred over a year before Applicant's trial. There is nothing to support a claim that Clark's reduced federal sentence was somehow contingent upon him testifying in Applicant's trial.

g) Applicant does not suggest that Clark's federal sentence reduction would be in jeopardy if he did not testify favorably for the State in this case.

h) Furthermore, Applicant has not shown that the information Clark gave to authorities in 2011 was going to have any *further* benefit if he testified in Applicant's trial. And, in fact, Clark received no additional benefit for testifying.

i) Applicant is conflating the benefit Clark already received with a motive to testify in exchange for a future benefit. But there is no evidence of any promise or understanding with Clark that he was going to further benefit his federal sentence by testifying in this case.

j) During trial, Clark testified that he was currently under federal supervision for possession with intent to deliver cocaine. When asked if he had any agreement "with the State" or "with the D.A.'s office to testify," he replied, "No." He showed up because he "got subpoenaed."

6. With regard to whether Green's testimony was false,

a) Green testified at trial that he, too, had been to federal prison, and that he is currently on federal probation for a possession with intent to deliver cocaine. He also admitted that he had an aiding in a bank fraud federal case, and other state cases.

b) Green testified that he did not want to come testify in this case; that it "wasn't beneficial" for him, and that he "ain't made up nothing."

c) Even though Green did in fact receive a reduction in his federal sentence as a result of his cooperative testimony in this case, there is no evidence that there was *a prior agreement*, or even a prior understanding *with the State prosecutors*, that his testimony was in exchange for such favorable treatment of his federal case. In fact, Tanner Neidhardt stated that he believed that Green did not expect to receive any benefit from testifying.

7. The court finds that Clark's testimony—that he did not have an agreement with the State that would impeach his credibility as a witness—was not false.

8. The court finds that Green's testimony—that he did not have an agreement with the State that would impeach his credibility as a witness—was not false.

9. The court finds that there was no agreement between Clark and the State, or between Green and the State, to testify favorably in this case in order to gain a benefit in their federal case.

10. Applicant has not shown that he would not have been convicted of Cumby's murder if Clark and Green had been impeached with questions related to their federal plea bargains.

11. As the trial record clearly indicates, the jury was aware that both Clark and Green had federal convictions. There is nothing persuasive in the record to suggest that, had the jury known that Green and Clark had already received reductions in their federal sentences because of having provided information in 2011 to state detectives regarding this case, the jury would have viewed Clark's and Green's testimony differently. There is nothing persuasive in the record to suggest that, had defense counsel been able to question these witnesses about the general terms of Clark's and Green's federal plea bargains, that would have affected how the jury weighed their testimony, particularly since there was no reference in either plea bargain to this case.

12. The trial court finds that the evidence reflecting that Green received favorable treatment in his federal case after he testified at Applicant's trial, viewed in light of the totality of the record, fails to demonstrate by a preponderance of the evidence that either Clark's or Green's testimony gave the jury a false impression. *See Ghahremani,* 332 S.W.3d at 477.

Grounds 2 and 3 – Brady Violations

13. The prosecution must give the defendant any evidence it possesses that is favorable to the defendant and material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83 (1963). This includes evidence which might be useful for impeachment by the defendant. *United States v. Bagley*, 47 U.S. 67 (1985).

14. Although a prosecutor has the initial responsibility to assess whether evidence may be favorable to the defense, the prosecutor is *not* the "final arbiter of what constitutes *Brady*

evidence." *Ex parte Temple*, No. WR-78,545-02, 2016 WL 6903758 *3 (Tex. Crim. App. November 23, 2016).

15. To establish entitlement to a new trial based on a Brady violation, a defendant must demonstrate that (1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith; (2) the withheld evidence is favorable to him; and (3) the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. *Hampton v. State*, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002).

16. Applicant urges this court to follow *United States v. Dvorin*, 817 F.3d 438 (5th Cir. 2016) in recommending that Applicant's conviction be vacated. In *Dvorin*, the District Court held that the prosecution had violated *Brady* and *Giglio* by failing to turn over a codefendant's plea agreement supplement similar to the ones in Clark's and Green's federal cases. The government agreed to an order vacating Dvorin's conviction, holding that the codefendant had testified falsely. The Fifth Circuit analyzed the issue as follows:

> Jason Dvorin was a business customer of Pavillion Bank ("Pavillion") with multiple accounts and loans collateralized by vehicles and oil-field equipment. To alleviate his periodic cash-flow issues, Dvorin brought checks to Pavillion's executive vice president, Chris Derrington, that neither man expected would clear. Derrington nonetheless processed the checks, giving Dvorin access to the face value of the check until the checks were returned. This arrangement operated as an unofficial line of credit. Dvorin and Derrington maintained this arrangement from 2005 through December of 2010, during which time the bank charged Dvorin more than $19,000 in overdraft fees.
>
> The arrangement continued for five years, in part because Dvorin was able to periodically deposit large, legitimate payments into his accounts. Ultimately, however, bank auditors discovered the scheme. In 2012, the government indicted defendant Dvorin on one count of conspiring to commit bank fraud. The superseding indictment alleged that between 2005 and December 2010, Dvorin and Derrington engaged in a scheme in which they deposited checks in Dvorin's account knowing the deposited checks would not clear. . . .
>
> After a two-day trial, a jury found Dvorin guilty. During trial, the government elicited testimony from Derrington, who had pleaded guilty to conspiring to commit bank fraud and was awaiting sentencing. Derrington explained that he had cooperated with the government during its investigation, and that he was testifying in the hope that he would obtain some leniency in his sentencing. The prosecutor asked Derrington whether he had received any promises from the government in exchange for his testimony, and Derrington responded that he had not. The court sentenced

Dvorin to 24 months of imprisonment and ordered $111,639.73 in restitution.

Dvorin appealed, and we set the case for oral argument. While preparing for oral argument, the government's appellate counsel discovered that the trial prosecutor, Mindy Sauter, had failed to disclose Derrington's sealed plea agreement supplement to Dvorin's counsel. The plea agreement supplement stated, in relevant part, that, "[i]f in its sole discretion, the government determines that the defendant has provided substantial assistance in the investigation or prosecution of others, it will file a motion urging sentencing consideration for that assistance." *The government produced the supplement to Dvorin's counsel and agreed to an order vacating Dvorin's conviction and remanding the case for a new trial.*

On remand, the district court sua sponte issued a show cause order in which it requested that the government's counsel file a pleading addressing why sanctions should not be imposed for Sauter's failure to disclose Derrington's plea agreement supplement and Sauter's permitting Derrington to falsely testify that the government had not made him any promises. The district court held an evidentiary hearing in connection with the show cause order, and thereafter made preliminary findings that Sauter had violated *Brady* and *Giglio* by failing to turn over Derrington's plea agreement supplement. The district court also concluded that Sauter had violated *Napue* by permitting Derrington to testify falsely regarding the promises the government made him. The district court found that Sauter did not act in "bad faith," but "exhibited a reckless disregard for her duties and conducted the proceedings in an irresponsible manner." . . .

. . . Dvorin was tried a second time and the jury once again convicted Dvorin of conspiring to commit bank fraud. The district court then imposed a new sentence of 18 months of imprisonment, two years of supervised release, and $110,939.73 in restitution. . . . The district court declined to impose sanctions based on Sauter's prosecutorial misconduct, but formally adopted as final its substantive findings that Sauter committed *Brady, Giglio*, and *Napue* violations. . . .

* * *

1. Brady and *Giglio*

Sauter contends that the district court erred in concluding that she violated *Brady* and *Giglio* by failing to provide Dvorin's counsel a copy of Derrington's plea agreement supplement before Dvorin's first trial. *Brady* prohibits the prosecution from suppressing evidence favorable to the defendant "where the evidence is material either to guilt or to punishment," *Brady,* 373 U.S. at 87, 83 S.Ct. 1194, and *Giglio* applies *Brady* to evidence affecting the credibility of key government witnesses,

United States v. Davis, 609 F.3d 663, 696 (5th Cir.2010). To establish a *Brady* violation, a defendant must show: (1) the evidence at issue was favorable to the accused, either because it was exculpatory or impeaching; (2) the evidence was suppressed by the prosecution; and (3) the evidence was material. *Brown,* 650 F.3d at 587–88. Sauter concedes that the plea agreement supplement was favorable to Dvorin because it related to the credibility of a government witness, but she contends that the district court erred in concluding that the supplement was suppressed and material.

a. Suppressed

Sauter argues that the plea agreement supplement was not suppressed because its existence was disclosed to Dvorin's counsel by a reference to it in Derrington's plea agreement, which was disclosed to Dvorin. Sauter contends that this should have prompted Dvorin's counsel to request the plea agreement supplement from the prosecution. Dvorin counters that the supplement was suppressed because, although the plea agreement referenced the supplement, the supplement itself was sealed, and thus could not be discovered by Dvorin's counsel through due diligence.

To constitute suppressed evidence under *Brady,* the evidence must not have been discoverable through the defendant's due diligence. *Brown,* 650 F.3d at 588. "[E]vidence is not suppressed if the defendant knows or should know of the essential facts that would enable him to take advantage of it." *Id.* (quoting *United States v. Skilling,* 554 F.3d 529, 575 (5th Cir.2009)). The *Brady* analysis regarding suppression focuses on the fact that the government need not "furnish a defendant with exculpatory evidence that is fully available to the defendant through the exercise of reasonable diligence." *Kutzner v. Cockrell,* 303 F.3d 333, 336 (5th Cir.2002). Sauter does not, nor can she, contend that the plea agreement supplement was fully available to Dvorin's counsel through the exercise of due diligence. *The plea agreement supplement was sealed and in the control and possession of the government. Accordingly, the district court correctly determined that Sauter suppressed the plea agreement supplement.*

b. Material

Sauter next argues that the plea agreement supplement was not material for *Brady* purposes, because there is no reasonable probability that, had the evidence been disclosed, the result of Dvorin's first trial would have been different. Dvorin responds that the testimony elicited at trial based on Derrington's plea agreement *did not convey* that the government had promised Derrington to forego other charges, had agreed that his testimony and statements could not be used against him, *and had agreed to file a motion for sentence reduction in the event it found Derrington's*

assistance substantial. Further, Dvorin contends that the testimony elicited at trial did not convey that all of these promises were expressly contingent on Derrington's testimony.

"Evidence is material if there is 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Brown,* 650 F.3d at 588 (quoting *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Spence v. Johnson,* 80 F.3d 989, 994 (5th Cir.1996) (quoting *Bagley,* 473 U.S. at 682, 105 S.Ct. 3375). The district court held that the plea agreement supplement was material because although the jurors might have been aware during trial that Derrington cooperated with the government in his own case, *they were not aware that Derrington had motivation to testify in Dvorin's trial. The court concluded: "[b]ecause the undisclosed evidence undermined the credibility of the Government's most important witness, ... it was material."*

We find no abuse of discretion in the district court's conclusion that this evidence was material. *Derrington was a key witness and the only other alleged conspirator with Dvorin. During trial, Derrington testified that he was "cooperating with the ... Government" and "hope[d] to obtain some leniency" at sentencing, but represented that he did not "get any promises from the Government in exchange for [his] testimony." During cross examination, Dvorin's counsel elicited testimony that Derrington was hoping to get favorable treatment from the court and the government based on his cooperation. But this testimony does not make clear, nor does the plea agreement itself indicate, that the government agreed to "file a motion urging sentencing consideration for Derrington's cooperation if, in its sole discretion, it determine[d] that he ha[d] provided substantial assistance in the investigation or prosecution of others." It is reasonable to conclude that evidence of such consideration would be more powerful than Derrington's testimony that he merely hoped he would receive leniency, but had not received any promise from the government that he would. "[G]iv[ing] play to the trial court's superior understanding of the trial, evidence, and witnesses," United States v. Sipe,* 388 F.3d 471, 480 (5th Cir.2004), we affirm the district court's holding that the withheld evidence was material, and thus conclude that Sauter violated *Brady* and *Giglio.*

2. Napue

Sauter also challenges the district court's holding that she violated *Napue's* prohibition against a prosecutor knowingly using false testimony to obtain a conviction. To establish a claim under *Napue,* a defendant must

prove that the witness's testimony "was (1) false, (2) known to be so by the state, and (3) material." *Summers v. Dretke,* 431 F.3d 861, 872 (5th Cir.2005). Sauter contends that Derrington's testimony was not false (and thus she could not have knowledge that it was false), and even if it was, it was not material.

With respect to the first element, Sauter argues that Derrington's testimony that he did not receive any promises from the government in exchange for his testimony was not false because the text of the plea agreement supplement is not an enforceable promise or guarantee. Paragraph 2 of the supplement reads:

> If, in its sole discretion, the government determines that the defendant has provided substantial assistance in the investigation or prosecution of others, it will file a motion urging sentencing consideration for that assistance. Whether and to what extent the motion are granted are matters solely within the Court's discretion.

Regardless of whether this provision of the supplement is an enforceable guarantee, under *Napue, "the key question is not whether the prosecutor and the witness entered into an effective agreement, but whether the witness might have believed that the state was in a position to implement any promise of consideration." LaCaze v. Warden La. Corr. Inst. for Women,* 645 F.3d 728, 735 (5th Cir.2011) (alterations omitted) (quoting *Napue,* 360 U.S. at 270, 79 S.Ct. 1173); *see also Giglio,* 405 U.S. at 155, 92 S.Ct. 763 ("[E]vidence of any understanding or agreement as to a future prosecution would be relevant to [the witness's] credibility...."). In fact, as the Supreme Court recognized in *United States v. Bagley,* the fact that *the government's willingness to seek leniency for a defendant is not guaranteed, but "was expressly contingent on the [g]overnment's satisfaction with the end result, serve[s] only to strengthen any incentive to testify falsely in order to secure a conviction."* 473 U.S. at 683, 105 S.Ct. 3375. The focus is "on the extent to which the testimony misled the jury[.]" *Tassin v. Cain,* 517 F.3d 770, 778 (5th Cir.2008). Here, Derrington's testimony that he had not received any promise from the government was at best misleading, and at worst false, *in light of the government's agreement to file a motion urging sentencing consideration if it determined that Derrington had substantially assisted its prosecution of Dvorin.* Accordingly, we hold that the district court properly concluded that Sauter violated *Napue* in permitting Derrington to testify that that the government had not made any promises in exchange for his testimony.

With respect to the third element—materiality—Sauter again challenges the district court's conclusion that Derrington's false testimony was material, and in doing so, concedes that the materiality standard under

Napue is essentially identical to the analysis performed under *Brady*. Thus, for the reasons discussed above, we conclude that Derrington's false statement that he had not received any promise from the government was material and, accordingly, affirm the district court's finding that Sauter violated *Napue*.

United States v. Dvorin, 817 F.3d 438 (5th Cir. 2016) (Emphasis added).

17. The trial court believes that Tanner Neidhardt *should* have provided the federal plea agreements and sealed plea agreement supplements to defense counsel. Merely disclosing their existence was not sufficient under *Brady*.

18. However, besides the fact that Fifth Circuit case law is not binding precedent in state habeas decisions (*See Cooper v. State*, 631 S.W.2d 508, 514 (Tex. Crim. App. 1982), there are key distinctions between the facts of this case and the facts in *Dvorin*, such that the holding in *Dvorin* is not controlling here.

a) In *Dvorin*, the prosecuting entity that had entered into the plea agreement with Derrington (the United States) was the same prosecuting entity who was prosecuting Dvorin. Derrington entered into his federal plea agreement with the understanding that, if he testified against Dvorin, he would receive a benefit in his case.

However, in the present case, the State was in no way a party to the plea agreement entered into between the United States and Clark and Green, and at the time Clark and Green pled in their federal cases, this case was not in consideration.

b) In *Dvorin*, Derrington was a co-defendant in the same fraudulent scheme who had pled guilty and was awaiting sentencing.

In this case, Clark and Green were not involved as defendants or accomplices. They were witnesses. They had already been sentenced in their federal cases, and the federal cases were unrelated to Applicant's State's case. The fact that they had already received a reduction in their federal cases for providing information to detectives in this case did not evidence any understanding or agreement of a future benefit for testifying.

c) In *Dvorin*, Derrington admitted that he was currently cooperating with the United States Government, and he admitted that he was hoping for leniency on his sentence in that same case as a reward for testifying. Thus, the plea agreement supplements that were withheld from Dvorin related directly to Derrington's admitted

motive for testifying favorably for the Government against Dvorin.

However, in this case, both Clark and Green denied cooperating with the State in order to benefit their federal cases. They denied having any type of agreement or arrangement, and they denied having any hope of gaining a benefit from testifying. Both appeared to be reluctant witnesses.

d) In *Dvorin*, the Government prosecuting Dvorin *had agreed* to "file a motion urging sentencing consideration for Derrington's cooperation if, in its sole discretion, it determine[d] that he ha[d] provided substantial assistance in the investigation or prosecution of others."

In this case, however, the Federal Government did not promise anything related directly to this case, and, more importantly, Neidhardt (the State) did not agree to do anything toward urging sentencing consideration in exchange for *or even as a result of* Green's or Clark's cooperation in this case. The State had no "discretion" to urge a reduction of Green's or Clark's federal sentences. All Neidhardt agreed to was, *if asked*, he would tell the federal prosecutors his impression of Green's and Clark's testimony in this trial. He made it clear, and this court finds him to be truthful and credible in this regard, that he made no advance promises to help Green and/or Clark in any way with regard to their federal cases. In fact, had it not been for Green's and Clark's federal attorneys, it is doubtful that Neidhardt would have ever contacted the federal prosecutor with regard to Green's and/or Clark's testimony in this trial.

19. Applicant urges that, even if there were no formal agreement, there was at least an *understanding* between the State and Green and Clark that if they testified favorably they would receive a benefit in their federal cases. **However, there is simply no evidence of such understanding.** In fact, both Clark and Green denied that there was any type of agreement or expectation on their parts to receive any *additional* benefit from testifying.

20. Clark and Green had already obtained a benefit on their federal sentences over a year before this trial for providing information to the State regarding this case. There is no evidence suggesting that they would have further benefitted, or expected to further benefit, from testifying against Applicant *at trial*.

21. Nevertheless, the trial court believes that the State, in an abundance of caution, should have provided the federal plea agreements and supplements to defense counsel. It is disingenuous to maintain that they could not be considered as favorable to the defense. While they do not constitute actual agreements between the State and the witnesses to

testify in this trial, they do represent what could be interpreted as evidence of a possible motive to testify favorably for the State. Defense counsel, if he'd been permitted, could have inquired further about the possibility that they could have sought further reduction of their federal sentences in exchange for their testimony. Even though both witnesses denied such incentive to testify for the State, having the actual plea agreements to impeach the witnesses might have been helpful to the defense.

22. But there is still no indication of how such line of questioning would have gone or how it would have affected the jury's decision, if at all. And that leads to the third requirement to establish entitlement to a new trial based on a Brady violation—a defendant must demonstrate that the evidence is *material.* Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Ex parte Adams*, 768 S.W.2d 281, 291 (Tex. Crim. App. 1989). The materiality of withheld evidence must be considered cumulatively and not item by item. *Turner v. United States*, 137 S.Ct. 1885 (2017).

23. This court finds that Applicant has not met the materiality requirement under *Brady*. In this case, there was too much of a disconnect between the state trial against Whitley and Green's and Clark's federal drug cases for which they had already been sentenced. It is true that the defense could have asked additional questions in an attempt to impeach their credibility. However, once their federal cases were revealed to the jury, and once they both denied having any agreements to testify in this case to better their federal cases, it is unlikely that any additional impeachment efforts would have *significantly* affected the persuasiveness of their testimony, particularly in light of the other facts presented by the State.

24. Thus, under these facts, even if defense counsel had been furnished Clark's and Green's federal plea agreements and sealed supplements, this court finds that there is not a reasonable probability that the outcome of the trial would have been different. Unlike in *Ex parte Temple*, No. WR-73,545-02, 2016 WL 6903758 *3 (Tex. Crim. App. November 23, 2016), in this case, the prosecutor's misconception regarding his duty under *Brady* was not "of enormous significance."

25. Applicant also alleges that the State failed to turn over the recorded conversations between federal lawyers for Clark and Green and SAPD regarding a possible deal in exchange for information about Cumby's murder.

    a) Alvin Clark's federal attorney, Scott McCrum, and Reginald Green's federal attorney, Clark Adams, contacted SAPD detectives by telephone in 2011 (two of the four recordings submitted as exhibits), stating that their clients had information about an unsolved murder, and they wanted to share this information with SAPD, in exchange for favorable treatment for their clients on their federal charges.

b) On August 29, 2011, Detective McNelly met with Alvin Clark and Scott McCrum (recorded interview submitted as an exhibit). In this recording, Alvin Clark's recitation of the facts are very similar to his testimony in Applicant's trial.

c) On December 16, 2011, an SAPD detective met with Reginald Green and his federal attorney Clark Adams in a federal detention facility in Florence, Colorado. This interview is the fourth recording submitted as an exhibit. In this recording, Reginald Green's recitation of how he learned of Latray Whitley's involvement in the murder was very similar to his testimony at trial.

d) These phone calls and interviews took place almost a year before Applicant was indicted for the Cumby murder.

e) As a result of Clark's cooperation in providing SAPD with information pertaining to Applicant's involvement in the Cumby murder, Clark's federal sentence was reduced. This occurred before Clark testified in Applicant's trial.

26. Applicant must show that the undisclosed recordings are favorable to his case. Applicant has not demonstrated that the disclosure of the recordings would have made the difference between a conviction and acquittal. Thus the recordings are not "favorable" as contemplated in *Bagley*. The recordings show that the witnesses were looking for a deal *at that time*, and as it turns out, they did receive benefit on their federal sentences for providing the information that was recorded. But that all took place almost two years before this trial, and the recordings do not establish that there was an agreement in exchange for testimony *in this trial*.

27. The recordings are of limited value because they do not refute the fact that there were no agreements in exchange for the witnesses's testimony. *See. Ex Parte Miles*, 359 S.W.3d 647, 666 (Tex. Crim. App. 2012) (citing *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Agurs*, 427 U.S. at 109–10, 96 S.Ct. 2392; *Hampton*, 86 S.W.3d at 613; *Smith*, 132 S.Ct. at 630–31).

28. With regard to the recordings, this court finds that Applicant has not provided sufficient facts to support a claim of prosecutorial misconduct, nor has Applicant met the materiality requirement.

29. Absent additional facts of an agreement or deal between the witnesses Clark and/or Green and the state regarding testifying favorably in order to benefit their federal cases, this court finds that there was no established connection between the federal cases and the witnesses's possible motive to "curry favor" with state authorities by testifying favorably in this case. *See Irby v. State*, 327 S.W.3d 138, 149 (Tex. Crim. App. 2010).

Ground 4 – Art. 38.075

30. Applicant's fourth ground for relief alleges the trial court erred in failing to submit a jury instruction based on Article 38.075 of the Texas Code of Criminal Procedure. Error exists when a judge fails to *sua sponte* instruct the jury in accordance with Art. 38.075. *Phillips v. State*, 463 S.W.3d 59, 65 (Tex. Crim. App. 2015).

31. An allegation of trial court error for failing to include a jury instruction that is alleged to be "law applicable to the case" is an issue that may be raised on direct appeal. Since Applicant was able to raise this issue on direct appeal, and failed to do so, he is not entitled to raise it in an application under Art. 11.07. *Ex parte Banks*, 769 S.W.2d 539 (Tex. Crim. App. 1989); *Ex Parte Gaither*, 387 S.W.3d 643, 648 (Tex. Crim. App. 2012) ("The Great Writ is reserved for extraordinary equitable matters when no other legal remedy is available; it is not merely another layer of, nor a substitute for, an appeal"). This claim is not cognizable on habeas review.

Ground 5 – Ineffective Assistance

32. Applicant's Fifth Ground for relief alleges that Applicant's counsel was ineffective for failing to request an Art. 38.075 instruction. Article 38.075(a) provides that, "a defendant may not be convicted of an offense on the testimony of a person to whom the defendant made a statement against the defendant's interest during a time when the person was imprisoned or confined in the same correctional facility as the defendant unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed."

33. Under the two-prong standard for reviewing ineffective assistance of counsel claims, the Applicant must show that (1) counsel's representation fell below an objective standard of reasonableness *and* (2) counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 698 (1984); *See also McFarland v. State*, 845 S.W.2d 824, 842-43 (Tex. Crim. App. 1992).

34. Isolated events of error in counsel's representation will generally not render him ineffective, but the totality of counsel's representation will be judged to determine whether he rendered ineffective assistance of counsel. *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1993).

35. To establish the second prong of prejudice, defendant must show that there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Hernandez v. State*, 726 S.W.2d 53, 55 (Tex. Crim. App. 1986) (citing *Strickland*, 466 U.S. at 694 (1984)).

36. In this case, Green testified to statements made by Applicant to Green, while the two were imprisoned, that were against Applicant's interest. Therefore, it would have been appropriate for the trial court to have included a jury instruction pursuant to Art. 38.075.

See Phillips v. State, 463 S.W.3d 59, 65 (Tex. Crim. App. 2015).

37. Defendant failed to object to the lack of an Art. 38.075 jury instruction. Unobjected to jury charge errors are reviewed under an egregious harm standard of review. *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985).

38. The corroboration requirement in Article 38.075(a) is similar to the one in the accomplice-witness statute, Art. 38.14 ("A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense."). To determine whether an appellant suffered egregious harm from the omission of an accomplice-witness instruction, courts look to the reliability or believability of the corroborating evidence and the strength of its tendency to connect the appellant to the charged offense. *State v. Ambrose*, 487 S.W.3d 587, 598 (Tex. Crim. App. 2016). The corroborative evidence need not be legally sufficient in itself to establish a defendant's guilt. *See Casanova v. State*, 383 S.W.3d 530, 538 (Tex. Crim. App. 2012).

39. In this case, there was evidence presented at trial which corroborated Reginald Green's testimony regarding Applicant's alleged confession to the murder:

a) Alvin Clark testified to witnessing the shooting.

b) Latoya Clark testified to Alvin Clark's statement to her regarding what he witnessed immediately following the incident.

c) A photo of the bullet entry into Alvin's Car from that night was entered into evidence.

d) The owner of the auto shop which repaired the damage to Clark's vehicle from the bullet testified to the date and time of the repair.

e) Donald Grinage testified to witnessing the incident as well.

f) Both Clark and Grinage testified that the shots came from the rear driver's side of a small dark colored black or blue car without tinted windows.

40. This court finds that the totality of the record demonstrates that the State offered credible corroborating evidence, in addition to Green's testimony, which tended to connect Applicant to the charged offense.

41. Even though trial counsel's failure to request an Art. 38.075 instruction was deficient conduct, the failure did not create a reasonable probability that the result of the trial would have been different had counsel asked for an Art. 38.075 instruction. *See, e.g., Davis v. State*, 278 S.W.3d 346 (Tex. Crim. App. 2009); *Ex parte Hatcher*, No. AP-76620, 2011 WL 6225406 (Tex. Crim. App. December 14, 2011).

42. This court finds that Applicant's trial counsel was not ineffective for failing to request an Art. 38.075 instruction.

43. Applicant also claims in Ground Five that trial counsel was ineffective for failing to obtain the federal plea agreements and plea agreement supplements after being notified of their existence by Neidhardt. Trial counsel admitted that he did not have federal experience, and he did not have an explanation for why he did not pursue the issue further. It is true that he could have pushed harder to obtain the actual plea agreements and plea supplements. It is also true that he could have further attempted to impeach the credibility of the witnesses with regard to the benefits they did receive from providing information to the State regarding this case, and with regard to any hopes of getting a future benefit.

44. However, to the extent that trial counsel was deficient for failing to obtain copies of the plea agreements, and/or to the extent that trial counsel was deficient for failing to preserve the *Brady* argument for appeal or otherwise properly object to his inability to further question the witnesses about potential bias, this court finds that the second *Strickland* prong has not been met. For the same reasons that the trial court found that the federal plea agreement evidence was not material under *Brady*, the trial court finds lack of prejudice under the second prong of *Strickland*. To establish ineffective assistance of counsel, the defendant must show that there is reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Had counsel obtained copies of the federal plea agreements and had he been able to explore the terms of such plea agreements on the witness stand with Green and Clark, it is more likely than not, based on their testimony, that they would have continued to deny expecting any benefit from testifying. Both witnesses were reluctant to testify at all, and both witnesses had already obtained a benefit in their federal cases from providing information in this case. The trial court finds that there is not a reasonable probability that the witnesses's testimony would have been different, and there is not a reasonable probability that the jury would have viewed their credibility any differently, had defense counsel been successful in further impeachment attempts related to the federal plea agreements. And, preserving the issue on appeal would not likely have resulted in a reversal of the conviction.

TRIAL COURT RECOMMENDATION

The first, second, third, and fourth grounds for relief raised by Applicant either were or could have been raised at trial and on direct appeal. The Court of Criminal Appeals could choose to deny such claims for that reason. *Ex parte Boyd*, 58 S.W.3d 134, 136 (Tex. Crim. App. 2001); *Ex parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004) ("We have said countless times that habeas corpus cannot be used as a substitute for appeal, and that it may not be used to bring claims that could have been brought on appeal.").

Should the Court of Criminal Appeals decide to review the merits of Applicant's first three grounds for relief, this court recommends that such claims be denied on the merits. The

trial court finds that the prosecution was obligated, but failed, to provide Green's and Clark's federal plea agreements and supplements to the defense. The trial court also finds that such plea agreements could be construed as being favorable to the defense. However, the trial court finds that, under the totality of the facts and circumstances in this case, the evidence withheld was not material because there is not a reasonable probability that, had the evidence been disclosed, the outcome of the trial would have been different.

With regard to the fifth ground for relief, for the reasons discussed above, the trial court finds that trial counsel was not ineffective, and thus recommends that this ground be denied as well.

Therefore, the trial court recommends that Applicant's application for writ of habeas corpus be **DENIED**.

ORDERS

The District Clerk of Bexar County, Texas, is hereby ordered to prepare a copy of this document, together with any attachments and forward the same to the following persons by mail or the most practical means:

a. The Court of Criminal Appeals
Austin, Texas 78711

b. Joe Gonzales
Criminal District Attorney
Conviction Integrity Unit
Paul Elizondo Tower
Bexar County, Texas 78205

c. Jorge Aristotelidis
jgaristo67@gmail.com
Tower of Life Building
310 South St. Mary's St. Ste. 1910
San Antonio, TX 78205
Attorney for Applicant on Writ of Habeas

SIGNED, ORDERED and DECREED on 1 MARCH 2019.

JEFFERSON MOORE
Judge, 186th Judicial District Court
Bexar County, Texas